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Dwight L. King v. Union Pacific Railroad Company : Brief of Appellant

Utah Supreme Court

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In the
Supreme Court of the State of Utah

DWIGHT L. KING, Administrator of the Estate of JOHN T. TOOMER, Deceased,
Plaintiff and Respondent,

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation,
Defendant and Appellant.

Case No. 7472

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The parties will be designated on appeal herein the same as they were designated in the trial court.

Dwight L. King, as Administrator of the Estate of John T. Toomer, Deceased, filed this action in the District Court of the Third Judicial District, in and for Salt Lake County, Utah, for and on behalf of Ida D. Toomer, widow, and John J. Toomer, son, the surviving heirs of John T. Toomer, deceased. The action was brought to recover damages for the death of John T. Toomer, who was instantly killed in a crossing accident when a 1946 half-ton Chevrolet pickup truck, which he was driving, came into collision with defendant's Streamliner passenger train on what is known as First Street crossing, which is the main street crossing in Cokeville, Wyoming, on May 1, 1948. The truck being driven by Toomer was owned by the Cokeville Land & Livestock Company, Toomer's employer, and that company assigned its interest and claim for damages with respect to said truck to the plaintiff herein, and damages are also sought by this action for the value of said truck.

The negligence charged against defendant by plaintiff as a basis of said action was that the defendant was operating its Streamliner passenger train at a high rate of speed in excess of the 30 miles per hour speed limit provided by ordinance in Cokeville, Wyoming; that the defendant obstructed the view of the deceased with respect to such approaching Streamliner train by a freight train standing on a passing track; and that defendant failed to have a flagman or other employe at the crossing to warn approaching motorists (R. 20).

Defendant denied the charges of negligence and alleged that the accident was due to the negligence of the

deceased, John T. Toomer, both upon the basis that the negligence of said deceased was the sole proximate cause of the accident, and that such negligence contributed to cause the same so as to bar plaintiff from any right of action herein.

At the conclusion of the evidence defendant moved for a directed verdict (R. 378, 381). The court denied the motion and submitted the case to a jury which returned a verdict in favor of the plaintiff.

STATEMENT OF FACTS

John T. Toomer and his family lived in a company house owned by the Cokeville Land & Livestock Company, his employer, which house was located immediately to the west of the defendant railroad company's tracks and right of way, some distance to the north of where said railroad tracks pass over First Street, or the main street, in Cokeville, Wyoming (R. 205). The deceased and his family had resided in this same house for approximately 10 years (R. 211). He was familiar with the crossing, having passed over it numerous times during the 10 years, if not daily, and he knew that the defendant railroad company's Streamliner passenger train passed through Cokeville sometime during the afternoon of each day (R. 212). First Street runs east and west and the railroad tracks cross it approximately north and south. On May 1, 1948 Mr. Toomer came home from work, got into the pickup truck, and drove southward from his home on a roadway paralleling the railroad tracks, south to First Street, going to the main

part of town east of the tracks in Cokeville to get some family groceries (R. 207).

At and over the First Street crossing, the defendant company maintained four separate tracks (Exhibit 1). The two westerly tracks were designated as and known as passing tracks (R. 107-R. 2). The next or third track from the west was the defendant company's single main line track. A fourth track farther east was known as a siding or house track. From the east rail of the west passing track to the west rail of the second passing track, measured at right angles, there was a distance of 8 feet 2½ inches. From the east rail of the second passing track to the west rail of the main line track, measured at right angles, there was a distance of 10 feet 3½ inches (R. 348, 352). Between the main line track and the house track to the east there was a distance of 48 feet. These distances were measured at right angles, whereas First Street itself as it crosses the tracks crosses at a slight variance from a right angle, as will be shown by the map, Exhibit 1, which was introduced into evidence upon stipulation of counsel at pretrial, and which is drawn to a scale of one inch to 20 feet. At the crossing, immediately to the west of the westerly track and to the east of the easterly of the four tracks on the south side of First Street, is a standard railroad crossbuck sign (Exhibits 1 and G). Immediately to the east of the main line track and on the south side of First Street is located an automatic wigwag crossing signal, which crossing signal consists of a disk about 24 inches in diameter, with a red light about six inches in diameter in the center thereof (R.

339). When this signal is in operation the disk wigwags or swings back-and-forth, the red light in the center is lighted, and a bell on the mechanism rings.

As Mr. Toomer approached the crossing on May 1, there was one of defendant's freight trains, headed north, standing on the middle of the three west tracks on the passing track just west of the main line, the front of the engine, as stated by various of plaintiff's witnesses, being 30 (R. 108), 40 (R. 115) or 50 feet (R. 130) south of the crossing, and according to Mr. Harmon, son-in-law of deceased and one of plaintiff's witnesses, 32 feet south of the end of the planking as measured by him according to his best recollection of where the engine stood, although measured sometime after the accident and after the train had moved (R. 185). Defendant's witnesses testified that the front of the engine was considerably farther to the south down in front of the depot and freight warehouse, and that the freight started to move as the passenger train approached and after the accident came to a stop where the front of the engine then was some 75 to 100 feet south of the crossing (R. 217, 221).

There is no claim by plaintiff that the defendant did not sound the whistle or bell on the Streamliner passenger train, and various witnesses, both those produced by plaintiff and defendant, testified that numerous whistles were sounded on the Streamliner (R. 136, 146-147, 165, 249-250, 222, 341). Defendant's witnesses testified the bell on the Streamliner was ringing (R. 274-275, 297-298), and no witness testified to the contrary. Some of plain-

tiff's witnesses and most of defendant's witnesses testified that the wigwag at the crossing was in operation, swinging back-and-forth, with the light on and the wigwag bell ringing (R. 136-137, 220-221, 252, 270-271, 310, Exhibit 2). Those who did not so testify made no observation from which they could state one way or the other, and it was not disputed by plaintiff that the wigwag was in actual and proper operation during all of the time involved immediately preceding the accident and for some little time thereafter. The wigwag signal was activated and operated only by approaching trains on the main line track, the contact point which would start the signal operating being 1650 feet south of the crossing (R. 338). The wigwag signal was never activated or caused to operate by trains on either of the passing tracks or on the house track to the east, and never had been connected up so that it would operate or be operated by trains on any track other than the main line track (R. 338-339).

Trains passed in Cokeville at various times, and the two tracks west of the main line track were designated as passing tracks and were known by residents in Cokeville as passing tracks (R. 133-134, 107). At the time of the accident there was no flagman at the crossing but the wigwag was in operation as stated above.

The day was stormy, and while one or two of plaintiff's witnesses thought it was snowing at the time, others of plaintiff's witnesses and all of defendant's witnesses stated that it had been snowing but at the time of the accident the snow had ceased and sometime later it started

to snow again (R. 109, 114, 121, 127, 137, 155, 162, 163, 239, 252, 280, 298). Being a spring storm the snow came in large flakes but was not enough to lie on the ground (R. 112). According to Toomer's son-in-law Harmon, in spite of the storm, visibility was good at least for 200 yards (R. 188).

Plaintiff's witnesses were able to observe the train and the approaching truck of the deceased for considerable distance from the track, and the fireman and engineer on the Streamliner train were able to observe the order board approximately a mile from the depot (R. 280-281, 298). Plaintiff's witness S. C. Curtis was 5 or 6 blocks away, coming from the east end of town and traveling in a westerly direction, and he watched both the Streamliner and the truck in which deceased was riding for some little time as they approached the crossing (R. 146-147). Plaintiff's witness Eldon Dayton was a block or more east of the crossing, traveling west, and he saw the Streamliner approaching and heard the whistle (R. 136).

As the deceased, John T. Toomer, approached the crossing, traveling southward from his home, he was traveling 25 or 30 miles an hour (R. 221, 277-278, 301-302, 319). The windows on his truck were up and he did not slacken speed or stop at any time (R. 320, 278, 301, 319, 329, 330). He turned onto First Street and traveled eastward over the crossing at approximately 30 miles an hour up until the moment when the center of his truck and the left front of the diesel engine on the Streamliner came into collision at the crossing. The Streamliner was travelng in a northerly

direction. Apparently Toomer was killed instantly, being thrown from his truck at the impact, and the truck was fastened onto the left side of the front portion of the diesel engine and carried a distance of approximately 1600 feet to the north, where the Streamliner came to rest. The emergency brakes were not applied on the Streamliner engine, the railroad employes testifying that at the speed the deceased was moving and the distance between the train and the truck when they first saw the truck, any emergency application of the brakes would be unavailing as far as the accident was concerned and could have done nothing except to upset and possibly injure passengers on the Streamliner (R. 278-279).

One or two of plaintiff's witnesses testified that the train was going in the neighborhood of 50 miles an hour and others could not give a fair estimate of the speed of the train (R. 128, 145); while defendant's witnesses testified that the train was going about 30 miles an hour at the time of the impact, but faster than that prior to the impact (R. 223, 276-277, 290-291, 300). The engineer testified that the speedometer on the train showed 33 miles an hour as he passed the depot building, and the train was slowing down at the time, so that in his opinion it was going approximately 30 miles an hour at the moment of impact (R. 291).

There were none of plaintiff's witnesses able to give any evidence as to the speed at which the deceased was traveling in his truck and therefore the testimony of defendant's witnesses that he was traveling 25 to 30 miles an hour stands undisputed in the record.

The only evidence as to the movements of the deceased, except from the witness Curtis, who saw him approaching and concluded there was going to be a collision with the train (R. 146), came from defendant's witnesses who stated that the deceased, John T. Toomer, never at any time slowed down or stopped prior to passing over the tracks at the crossing, in spite of the fact that the wigwag was in operation (R. 221, 250-252, 278, 301). The witness Curtis observed him for some little time and concluded there was going to be a collision between the train and the truck, but during the time of his observation Curtis, who was plaintiff's witness, stated that the truck never stopped or slowed down (R. 147).

No statutes or other laws of the State of Wyoming or of the Town of Cokeville were pleaded or put in evidence other than the ordinance limiting speed of trains to 30 miles per hour, and therefore there is nothing in the record to show that the law of Wyoming is in any respect different from the laws of Utah as applied to circumstances surrounding this accident other than the one ordinance setting the speed limit of trains at 30 miles per hour.

There was no charge in the pleadings and no issue raised thereby with respect to the crossing being extra hazardous in any respect, and there was no evidence given at the trial that would show or tend to show that the crossing was such as to require any additional or extra precautions to be taken by the defendant railroad company.

Some few facts in addition to those hereinabove stated will be referred to in argument, and particularly more de-

tail concerning facts as hereinabove stated will be pointed out during the course of the argument.

STATEMENT OF ERRORS COMMITTED BY THE TRIAL COURT AND POINTS UPON WHICH APPELLANT INTENDS TO RELY FOR REVERSAL.

1. The trial court erred in denying and overruling defendant's motion for a directed verdict as made at the conclusion of all the evidence.

2. The trial court erred in refusing to give defendant's requested Instruction No. 1.

3. The trial court erred in giving Instruction No. 10, and particularly subparagraph (b) of paragraph (1) thereof.

4. The trial court erred in giving subparagraph (c) of paragraph (1) of Instruction No. 10.

5. The trial court erred in giving subparagraph (b) of paragraph (2) of Instruction No. 23.

6. The trial court erred in giving subparagraph (c) of paragraph (2) of Instruction No. 23.

7. The trial court erred in giving Instruction No. 12.

8. The trial court erred in giving Instruction No. 13.

9. The trial court erred in giving subparagraph (f) of Instruction No. 13.

10. The trial court erred in giving subparagraph (g) of Instruction No. 13.

11. The trial court erred in giving subparagraph (h) of Instruction No. 13.

12. The trial court erred in giving subparagraph (i) of Instruction No. 13.

13. The trial court erred in giving the concluding paragraph of Instruction No. 13.

14. The trial court erred in giving Instruction No. 15, and particularly that portion of No. 15 stating: "There is a presumption that at and prior to the time of the collision that the said Toomer was exercising ordinary care for his own protection."

15. The trial court erred in refusing to give defendant's requested Instruction No. 4.

16. The trial court erred in refusing to give defendant's requested Instruction No. 5.

17. The trial court erred in refusing to give defendant's requested Instruction No. 15.

18. The trial court erred in refusing to give defendant's requested Instruction No. 16.

19. The trial court erred in refusing to give defendant's requested Instruction No. 21.

20. The trial court erred in refusing to give defendant's requested Instruction No. 23.

21. The trial court erred in refusing to give defendant's requested Instruction No. 25.

22. The trial court erred in refusing to grant defendant's motion for new trial.

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN OVERRULING AND DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT AT THE CONCLUSION OF ALL OF THE EVIDENCE AND IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 1. (Statement of Errors 1 and 2).

The accident upon which this suit was brought happened in the State of Wyoming, and in spite of that fact and the fact that suit was brought thereon within the State of Utah, the plaintiff did not plead any statutes of the State of Wyoming or ordinances of the City of Cokeville to show that the Wyoming law was different in any respect from the Utah law, except with respect to the one instance where the ordinance of Cokeville was pleaded and admitted which set a speed limit of 30 miles an hour for trains moving through Cokeville. It is a general rule followed by most jurisdictions and established and reaffirmed by this court in numerous cases that where the laws of a foreign state are not pleaded or offered in evidence, our courts, including the Supreme Court, must conclude that the laws of such state are the same as those of the forum.

In the case of *Dickson* v. *Mullings*, 66 Utah 282, 241 P. 840, a surety company which had given bond in the

State of New York was involved in a habeas corpus proceeding brought in the State of Utah after the criminal, who had violated his bond, was found within the State of Utah. In that case this court held:

> "Whether the state of New York has a statute on the subject is not shown. No such or any statute of New York is either pleaded or proved. It, of course, is well settled that state courts cannot take judicial notice of laws or statutes of a sister state. It also is well settled in this jurisdiction (Cases cited) that, in the absence of proof, it will be presumed that the law of another state is the same as the law of the forum and the court will administer and apply the law of the jurisdiction until the law of the situs is shown. Thus, in the absence of proof, it will be presumed that the law of New York on the subject is the same as the law of Utah."

In the case of *Whitmore Oxygen Co.* v. *Utah State Tax Commission,* . . . Utah . . ., 196 P. 2d 976, it was held that the statutes of a sister state would be presumed to be the same as Utah statutes where the statutes of the sister state were not pleaded or proved.

See also:

Buhler v. *Maddison,* 105 Utah 39, 140 P. 2d 933.
United Air Lines Transport Corp. v. *Industrial Commission,* 107 Utah 52, 151 P. 2d 591.
Gillespie v. *Blood,* 81 Utah 306, 17 P. 2d 822.
Smith v. *Smith,* 77 Utah 60, 291 P. 298.
McGarry v. *Industrial Commission,* 63 Utah 81, 222 P. 592.
Grow v. *O. S. L. R. Co.,* 44 Utah 160, 138 P. 398.
Stanford v. *Gray,* 42 Utah 228, 129 P. 423.

At the time of the accident in question the laws of Utah provided as follows:

> Utah Code Annotated 1943, Section 57-7-159.
>
> "Whenever any person driving a vehicle approaches a railroad grade crossing, the driver of such vehicle shall stop within 50 feet but not less than 10 feet from the nearest track of such railroad and shall not proceed until he can do so safely when:
>
> "(a) A clearly visible electric or mechanical signal device gives warning of the immediate approach of a train.
>
> "(b) A crossing gate is lowered, or when a human flagman gives or continues to give a signal of the approach or passage of a train.
>
> "(c) A railroad train approaching within approximately 1,500 feet of the highway crossing emits a signal audible from such distance and such train by reason of its speed or nearness to such crossing is an immediate hazard.
>
> "(d) An approaching train is plainly visible and is in hazardous proximity to such crossing."

Section 57-7-224, which is a part of the same enactment, reads:

> "It is a misdemeanor for any person to violate any of the provisions of this act, unless such violation is by this act or other law of this state declared to be a felony."

Thus the law which would be applicable to the accident involved in this case required that any or every person when approaching a railroad crossing in a vehicle "shall stop within 50 feet but not less than 10 feet from the nearest track of such railroad and shall not proceed until he can do so safely when: (a) A clearly visible electric or me-

chanical signal device gives warning of the immediate approach of a train. * * *"

In his complaint the plaintiff said nothing about the existence or operation of a mechanical warning signal at the crossing but did charge the defendant with negligence for failure to station a flagman at the crossing to warn travelers. At the trial, however, the evidence, without dispute, showed that there was a mechanical wigwag signal at the crossing near the main line track, with a wigwag arm containing a disk 24 inches in diameter with a 6 inch red light in the center thereof, and a bell attached to said mechanism, and that at all times surrounding the occurrence of the accident the wigwag was in operation, swinging back-and-forth, the light in the center of the wigwag was on red, and the bell mechanism in connection with the wigwag signal was ringing. The only witnesses who testified with respect to such signal confirmed the fact of its operation, and nowhere in the pleadings, evidence, or argument did the plaintiff attempt to dispute the fact that such signal was in proper operation at the time.

The evidence conclusively and affirmatively shows that the deceased, John T. Toomer, as he approached this crossing approached it at a speed between 25 and 30 miles an hour; that he never at any time slowed down or came to a stop, but without slackening his speed drove over the crossing in the face of the operating mechanical signal and into the collision with defendant's Streamliner passenger train.

At this point we should like to refer to the testimony. Plaintiff's witness S. C. Curtis, who was 5 or 6 blocks east of the crossing on First Street (R. 147), testified (R. 145-147):

> "A. Well, I was considerable distance away and I saw this car coming, but the Streamliner—they came immediately onto the crossing together, * * *"

With respect to the truck he said:

> "A. Well, I just saw it coming.
>
> "Q. Which way was it coming?
>
> "A. It was coming east.
>
> "Q. Did you see it when it turned from a southerly direction, to turn east?
>
> "A. No, I didn't see it when it turned.
>
> "Q. How long did you watch him?
>
> "A. Well, I was pretty much concerned about the way they were coming, so close together.
>
> "Q. Could you see the Streamliner before it arrived at the street here?
>
> * * * * *
>
> "A. I watched it off and on all the way up, coming up the track.
>
> * * * * *
>
> "Q. Now getting back to this truck, when you first saw him he was coming east on First Street?
>
> "A. Yes.
>
> "Q. And about how long did you observe him, would you say?
>
> "A. Well, I was driving along and I was watching the road, and other things, and I just happened to see him momentarily when he first came into my vision.

"Q. Did you ever see him stop?
"A. No, I never saw him stop."

The witness Charles Mackey testified that he say Toomer coming south on the roadway to the west of and paralleling the tracks (R. 319, 320, 329-330):

"Q. Can you give us — When Mr. Toomer passed you can you give us an opinion as to how fast he was going?
"A. I would say 25, 30 miles an hour.
* * * * *
"Q. Did you ever at any time, from the time he passed up by the toolhouses, until he got to the crossing, see him slow down?
"A. No, sir.
"Q. Did you observe anything with respect to what he did, one way or the other?
"A. The only thing I know, he kept going, and he hadn't stopped until he hit the train, that is all.
* * * * *
"Q. When you saw Mr. Toomer is that where you say he was going 25 or 30 miles an hour?
"A. Yes, sir.
"Q. You didn't see him any more after that, did you?
"A. I could see him until he hit the crossing.
* * * * *
"Q. Did you watch Mr. Toomer at all?
"A. I turned just as he hit the crossing."

The witness Taylor, engineer on the freight, testified (R. 221):

"Q. Did you observe the truck before he was hit?
"A. Yes.
* * * * *

"A. I estimate his speed at about 30 miles, approximately 30 miles as he crossed over the crossing.

"Q. Did you ever, at any time, see him stop?

"A. No.

"Q. Did you see him slow down?

"A. No."

The same witness testified with respect to the point where he first saw Toomer's truck (R. 228-229):

"A. Well, I could, I believe I could see that automobile when it hit the—when it came on the rail, the west side of that passing track.

* * * * *

"A. The first I saw was at about the time it came over the west rail of the track I was standing on."

The witness Earl Wilcox testified that he was on the west side of the standing freight engine, and he saw first the Cozzens car or sedan and then Toomer's truck go by (R. 249). Wilcox testified (R. 250):

"Q. Would you say he was going slow or fast, or what?

"A. He was going fast, yes."

In response to a question as to whether the truck stopped the witness stated that Toomer couldn't have stopped, and upon counsel's motion that answer was stricken, but later on (R. 251), the court overruled the objection to the following question and it was answered as follows:

"Q. And should he have stopped at any time west of those tracks, would you have seen him?

"A. That is right."

The witness Reed, engineer of the Streamliner, testified (R. 277-278):

"A. The next I seen was a truck come from the west and was just coming on to the passing track as I was coming up the road crossing.

* * * * *

"A. * * * I think he was just coming up to what we term as the eastbound passing track.

"Q. That is the furthest west of the three?

"A. It is the outside passing track.

* * * * *

"A. Well, I would say he was going just about the same speed I was, 30 miles an hour, * * *

* * * * *

"Q. During the time after you first saw him until he got right on the main line ahead of you did he ever, at any time, slow down with his truck?

"A. No, sir.

* * * * *

"Q. Did he slow down at all?

"A. No, sir."

Vernon A. Wilcox, fireman on the Streamliner, testified (R. 301-302):

"Q. Where was the truck when you first saw it?

"A. It was about 50 or 60 feet from us.

"Q. And where with reference to those tracks would you say it would be?

"A. I would say it was about 10 feet the other side of the outside of the west passing.

"Q. To the west of the west passing track? And can you give us an opinion as to about how fast the truck was going?

"A. He was going about the same speed we were. That was about the same speed, distance from the main line as we were from the crossing there.

"Q. About the same distance?

"A. Yes.

"Q. And you met right at the crossing?

"A. That is right.

"Q. As he came across those tracks and up to the crossing, did he slow down at all?

"A. He didn't slow down."

The witness Sparks walked across the crossing, and after crossing the main line turned around and watched the Streamliner, but never did see Toomer until just at the moment of impact (R. 310).

It is true that none of the witnesses could testify that they were watching Mr. Toomer all of the time from the time he left his home until the accident, but various ones saw him at various times during his journey toward the crossing, and not one of them—either of plaintiff's or defendant's witnesses—at any time saw him slow down or stop. If he had slowed down or stopped the witness Mackey would have known it. If he had slowed down or stopped at any time he could not possibly have been going the 25 or 30 miles per hour, which was his undisputed speed, at a point to the west of the west passing track when the fireman and engineer of the Streamliner first saw him, as was stated by the fireman on the standing freight train, Earl E. Wilcox.

Under the circumstances, he could not possibly have stopped in his progress toward the track or some one of the

many witnesses would have seen him standing waiting there, rather than, as the fireman and the engineer of the Streamliner testified, that he was proceeding at 30 miles an hour at some point at least 10 feet west of the west passing track and continued at that same rate of speed without slowing or stopping until the collision, and this in spite of all of the signals being given at the time.

The action of the deceased, John T. Toomer, in so attempting to pass over the crossing in the face of such warning was in direct violation of the laws above quoted and as such constituted negligence on his part as a matter of law. The trial court should have so held and should have granted the defendant's motion for directed verdict upon the basis that the deceased was guilty of contributory negligence—if not guilty of negligence constituting the sole proximate cause of the accident.

There have been a number of cases before our Utah courts involving a situation where a mechanical warning signal has been located at a crossing, but at the time of the accident in question it has been found that the signal was not operating as it should, and this court on several occasions has held that even under such circumstances where a mechanical signal has been located at the crossing but fails to operate and give warning as it should, nevertheless a traveler on the highway is not entitled to place entire reliance upon such signal or upon the failure of the signal to activate, but must still exercise reasonable care in looking and listening for trains which may be approaching. If that is true, what should be the situation when a mechanical

signal is located at a crossing and admittedly is operating properly, but a traveler attempts to pass over the crossing in face of such warning and is injured and killed?

We have been unable to find where such a question has heretofore been presented to this court, and therefore the question as it is involved in this case is, in our opinion, one of first impression here. However, the statute as above referred to is a uniform statute, and either in identical terms or in very similar terms has been in force in other jurisdictions and cases involving the failure of such a driver to pay proper heed to such a mechanical warning have reached the highest courts of many of our sister states. Counsel for appellant herein have made a search of cases, and while we do not necessarily contend that the cases found constitute all of the cases upon such subject, we have found no case involving such facts wherein a court has held that such a driver is not guilty of contributory negligence as a matter of law. The cases seem to be unanimous in holding that such conduct does amount to negligence as a matter of law. Particularly is that true where the statute, as is the case with our statute, provides a misdemeanor or other criminal penalty where there is a violation of such statutory provision.

In the case of *Pennsylvania R. Co.* v. *Folger,* 170 F. 2d 238, the United States Court of Appeals for the Sixth Circuit had before it similar question involving an Ohio statute which provided:

> "No person shall drive a vehicle across a railroad grade crossing when:

"(a) A clearly visible electric or mechanical signal device gives warning of the immediate approach of a train * * *."

In that case there were four sets of railroad tracks extending over the crossing and flasher light signals were located at the crossing. As Folger approached the crossing a freight train was standing on a side track with the front end of the engine some 250 feet or 300 feet east of the highway. An eyewitness testified that Folger did slow down but did not stop his automobile and continued across the crossing and was struck and killed by a passenger train. The question of the extent of view that Folger may have had was not discussed. It appeared that the accident happened at approximately midnight. However the Federal Court disposed of the case rather summarily, stating as follows:

"Here the uncontradicted evidence shows that flasher lights were in operation during the entire period of the accident. The locomotive was some 490 feet west of the crossing, going 70 miles an hour at the time the automobile was some 70 feet from the track. The all-important fact is that the passenger train was within the circuit of the flasher light, which is conceded to be 3387 feet west of the crossing, as the decedent drove up to the tracks. * * *

"We deem it unnecessary to discuss the question of physical obstructions on the right of way and the layout of the tracks, because in our view one proposition is determinative, namely, that the evidence, when considered in the light most favorable to the appellee, establishes as a matter of law that the decedent was guilty of contributory negligence which

> *proximately contributed to cause his death. It is uncontradicted on this record that the decedent drove across the crossing in violation of statute, and thus was guilty of negligence per se.*" (Italics ours.)

It appeared in that case, different from what the evidence shows in the case at bar, that the freight train on the side track may also have activated the flasher signal, but with respect to that the Federal Appellate Court stated:

> "* * * The fact that the flasher light was also giving warning of the presence of the standing freight train does not affect the determinative importance of the circumstance that the decedent had warning of the approach of the passenger train.
>
> "Under these conceded facts, the case falls squarely within the ambit of Section 6307-60, General Code of Ohio. Driving across the grade crossing under these circumstances was negligence per se, under long-established Ohio law. (Cases cited.)"

In that case the trial court had submitted the matter to a jury and a verdict had been rendered for the plaintiff, but the appellate court concluded:

> "The judgment is reversed and the case is remanded with instructions to enter judgment for the appellant."

Brown v. *Pennsylvania R. Co.*, (Ohio) 61 N. E. 2d 163, is a case in which plaintiff as she approached a railroad crossing, and some distance from the tracks, saw flasher lights flashing at the crossing. She stopped a short distance from the crossing, waited some little time, and as no train approached, she put her car in low gear, started over

the tracks, and got up to a speed of about 10 miles an hour. As she got onto the tracks the motor in her car stalled and she then saw a train approaching. The trial court submitted the matter to a jury, which returned a verdict for the plaintiff. The court of appeals stated that the trial court should have directed a verdict, and in reversing the trial court stated:

> "It is not necessary to discuss the issue of the defendant's negligence raised by the pleadings and evidence, since the evidence on that issue was conflicting and the jury was justified in finding that certain acts of negligence were committed by the defendant. The chief legal question, as we see it, is whether the undisputed evidence discloses that the plaintiff was guilty of contributory negligence as a matter of law.
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> "The record discloses that when she was approaching the railroad crossing, Elizabeth Brown saw the automatic signals flashing. She stopped at the track because they were flashing. She did not see a train but other automobiles were crossing the tracks, so she drove on the crossing and her car stalled there. She says that she did not see the lights flashing just as she drove upon the tracks, but yet there is undisputed evidence that they were in good condition; that they had been flashing a short time before the accident, and they were also flashing after the accident, and it can reasonably be presumed that they were flashing when she drove upon the crossing. She did not see the lights flashing as she started to cross the tracks, but she does not say that she looked at the lights at this time. We feel that it can be reasonably presumed that since she was intent upon looking for a train, that she did not look just before she started over the tracks to see

> if they were flashing at that time. The rule, we think, is well established in Ohio, that one who drives his automobile on a railroad crossing disregarding the watchman with a stop sign, or a bell, or flashing signals, is guilty of contributory negligence as a matter of law, when struck by an oncoming train."

In the case of *Byerly* v. *Northern Pac. Ry. Co. et al.*, (Wash.) 120 P. 2d 453, the Washington statute provided that a person operating a vehicle as involved in the case should stop within 50 feet but not less than 20 feet, and "not proceed until he can do so safely. The operator of any vehicle shall stop his vehicle and remain standing and not traverse any railroad grade crossing * * * when a * * * mechanical or electric signal gives or continues to give a signal of the approach or passage of any train * * *." Byerley was driving a truck and approached and attempted to pass over a crossing which was protected by a mechanical wigwag signal. It was not contended that the wigwag signal was not working, or that the signal bell attached to it was not ringing, but it was contended that the signal was so located that it was not clearly visible and that the signal bell was not loud enough to be audible to one approaching in a truck. The trial court submitted the matter to a jury, which returned a verdict for plaintiff, but the Supreme Court of Washington reversed the trial court with instructions to enter a judgment dismissing the action. The Washington Supreme Court stated:

> "We are clearly of the opinion that the testimony is conclusive that at the time of the accident, the wigwag signal was clearly visible to Mr. Byer-

> ley as he approached the crossing; that it was working, and that the bell in connection therewith was ringing loudly enough to be heard a distance of 293 feet. *In our opinion, if Mr. Byerley did not see the signal, it was because he did not look, and it cannot be contended that he looked and did not see that which he must have seen had he looked. We are also satisfied that had he listened, he must have heard the signal bell.*" (Italics ours.)

There was some discussion in that case of what was termed a reasonable margin of safety rule. With respect to that, the Washington Supreme Court stated:

> "* * * We seriously doubt that the reasonable margin of safety rule could or should be applied in favor of one approaching a railroad crossing such as the one in question, having a standard automatic signal device, which is clearly visible and operating at the time. We have never so held, nor have we been cited to any case so holding."

In the case there was a discussion with respect to equal and reciprocal rights of travelers on a highway with railroad trains, and with respect to that the Washington Supreme Court stated:

> "* * * we cannot believe that the rights of such user of the highway and the train are equal, when, as in this case, there was a warning signal in operation, complying with the state law, and again may we state we have been cited to no case which so holds. This signal is not a warning that one on the highway must just look and listen, after which he may, under certain circumstances, proceed, but the statute says he shall stop his vehicle and remain standing and not traverse any railroad grade

> crossing when a human flagman or mechanical or electrical signal gives or continues to give a signal of the approach or passage of any train. We cannot help but conclude that under the circumstances last above stated, and such as appeared at this crossing at the time of the accident, the train had the absolute right of way over highway traffic, from the time such signal began to operate until the train had passed over the crossing."

A number of courts have held a person to be contributorily negligent where in an ordinary passenger car he attempts to pass over a crossing in the face of a warning signal from a flagman or mechanical signal, and there are likewise cases involving vehicles engaged as public carriers of passengers, or inflammable liquid or dangerous explosives, or vehicles of an excess size or weight, with respect to which similar holdings have been given by the various courts.

In the case of *Garbacz* v. *Grand Trunk Western Ry. Co.*, (Mich.) 34 N. W. 2d 531, a heavily ladened vehicle was involved. In that case the trial court directed a verdict for defendant, and the Supreme Court of Michigan affirmed the trial court. We quote from the opinion:

> "Plaintiff claims that the blinker warning signals at the crossing were not working, that no bells or whistle were sounded, for if they had been, he would have heard them. He admitted, however, that he did not bring his tractor and trailers to a stop, as required by law. He had been traveling at a rate of 35 miles per hour, but reduced his speed to 20 to 25 miles per hour as he neared the tracks. When about 25 feet from the tracks, he first saw the train

approaching about 50 feet to his right. He tried to avoid the collision by attempting to stop and swerving to the left."

The law applicable to the case provided that such a vehicle should not be driven across the railroad tracks at grade without first bringing the vehicle to a full stop within 50 feet but not less than 10 feet from the tracks, and that the driver "shall not proceed until he shall have determined that it is safe to cross." The Michigan Supreme Court held: "Violation of the law is negligence per se." The court also stated:

> "Plaintiff contends, however, that there is no showing that the failure to stop before crossing the tracks contributed to the accident. *It is not necessary to show what was so perfectly obvious. It would follow from what the proofs disclosed, that at the rate the train was approaching, had plaintiff stopped, he would have seen the train straight ahead of him or it would have crossed the road before he started again. Where the record is such that men with reasonable minds would not differ, as here, there is no question of fact for the jury.* Swift v. Kenbeek, 289 Mich. 391, 286 N. W. 658." (Italics ours.)

In the case of *Lang* v. *Chicago & N. W. Ry. Co.*, (Wis.) 40 N. W. 2d 548, plaintiff sued for injuries to himself and damages to his truck. In that case there was also a statute which required a person driving a truck to stop not less than 20 or more than 40 feet from the track, and the evidence showed that the plaintiff did not stop as required by law. The trial court submitted the matter to a jury, which returned a verdict for plaintiff. The Wisconsin Supreme

Court held Lang to be guilty of negligence as a matter of law and reversed the trial court's judgment. In that case it appeared that there were box cars on a side track near the street which obstructed the view of an approaching motorist, and the trial court instructed the jury as follows:

> "A railroad company which, by leaving cars near or upon a public crossing, has obstructed the view and created an extra danger to travelers, is bound to use extra precaution in the operation of its trains by approaching the crossing at a less amount of speed or by increased warnings, or otherwise, and the fact that the crossing is within the yard of the railroad company makes no difference; and such railroad company is negligent if it leaves a car near or upon a public crossing and thereby obstructs the view and creates an extra danger to travelers without taking such extra precautions in the operation of its trains."

With respect to this instruction the Supreme Court of Wisconsin stated:

> "No authority is cited to support the instruction as applied to the facts in this case, and we find none.
>
> "It is considered that this is an incorrect statement of the law. In the first place it entirely ignores the effect of the statutory requirement that a person driving a truck across the main line tracks of a railway at a grade shall stop his truck at least 20 and not more than 40 feet away. * * *
>
> "In placing the box car where they did, which was at a point, according to the testimony of the plaintiff, six to eight feet east of the east sidewalk on Pine street, defendant's employees had a right to assume that persons driving trucks across the

intersection would obey the statutory command and come to a full stop not less than 20 nor more than 40 feet from the main line. * * *

"*It is apparent that if the plaintiff had complied with the requirements of the statute no accident would have occurred.*" (Italics ours.)

The Supreme Court stated further:

"* * * *The trainmen were not required to anticipate that a truck driver crossing the main line track would violate the statutory rule and not stop.*

"* * * *To excuse the plaintiff from performing his statutory duty under the circumstances of this case would amount to nothing less than an amendment of the statute. The statute makes no exceptions. A truck driver is required under the statute to come to a full stop, not to stop at his discretion.* * * *" (Italics ours.)

In the case of *New York Cent. Ry. Co.* v. *Powell,* (Ind.) 47 N. E. 2d 615, an Indiana statute provided that any driver of a motor vehicle transporting explosives or highly inflammable materials should not drive upon tracks of a railroad company "unless such person shall first bring such vehicle to a full stop, and, shall ascertain definitely that no train, car or engine is approaching such crossing and is in such close proximity thereto as to create a hazard or danger of a collision." Powell was driving a gasoline truck which came into collision with one of defendant's trains. There was a wigwag and bell at the crossing, and there was a provision of the statute above referred to that the act should not apply to railroad crossings equipped with mechanical crossing signals. The Supreme Court of Indiana concluded

that: "It must have been the legislative conclusion that, of course, all travelers would take notice of the warning afforded by mechanical signals," and in spite of the exception in the statute, the Indiana Supreme Court reversed the trial court's verdict and judgment for plaintiff and held the deceased to have been guilty of negligence as a matter of law for failing to observe and heed the mechanical signal, and for failing to stop in response to its warning. The jury found that the locomotive whistle and bell were properly sounded and that the automatic crossing bell was ringing, but that the decedent heard none of these signals. As a matter of fact, the Supreme Court stated that there was no dispute concerning the fact that the crossing signal was in actual operation. With respect thereto the Indiana Supreme Court stated:

> "* * * There is no allegation or proof of any abnormal situation that would have prevented the decedent from hearing the signal. It was heard by many persons farther away from the crossing than the decedent. It must be concluded that he could have heard it if he had listened, and that he either heard the signal and proceeded upon the track notwithstanding, or that he failed to give his attention and to listen for the signal. In either event he was negligent, and the negligence was a definite contributing cause of the collision."

Because of conflict in the evidence with respect to signals from the train, the Supreme Court said that although the preponderance of the evidence indicated that these signals were given, still because of some conflicting testimony, it would have to be assumed on the appeal that

the railroad was negligent with respect to signals from the train. In spite of this fact and in spite of the fact that the court said such negligence should be considered as a contributing cause, the Supreme Court of Indiana reversed the trial court on the basis that the negligence of Powell also contributed to the accident. It appeared in evidence that there was some obstruction to vision, and with respect to this the jury found that the deceased could see down the main track only to the extent of 150 feet when his motor vehicle was at a point 14 feet south of the south end of the ties on the main track of the crossing, and for a distance of 400 feet when his vehicle was 6 feet 2 inches south of the south end of the ties; that the obstructed vision prevented him from seeing the train, and because of such obstructed vision he slowed his speed. There was no evidence, however, as to whether he stopped his truck. The jury based its verdict entirely upon the fact of the obstructed vision, plus the speed at which the train was operating. In reversing the trial court the Indiana Supreme Court stated that there was no evidence of unusual noises calculated to interfere with the hearing of usual signals and warnings. With respect to interference with the vision and signals the Supreme Court stated:

> "The appellee says that there was fog and rain which interfered with vision and with hearing signals, but, if so, the fact must have been apparent. It did not affect the signals; it merely affected the ability of the traveler to see and hear. *The law requires that he use care in looking and listening, and this care must be commensurate with the conditions which confront him.* There is no allegation in the

complaint that the signals were inadequate because of weather conditions, nor do we find any evidence of fog. There was some evidence that it was raining. But the decedent was acquainted with the crossing and with the automatic signal upon which he relied. *If rain interfered with the normal opportunity to observe these signals of danger, it was his duty to take cognizance of the fact and to use his senses in a manner reasonably calculated to inform him of approaching danger. He was not free to drive blindly into a place of known danger.* * * *" (Italics ours.)

As a conclusion from the findings of the jury, the Supreme Court stated with respect to deceased:

"* * * that he either heard the bell and went upon the crossing notwithstanding, or that he failed to give his attention to and listen for the automatic signal. In either event he was guilty of contributory negligence."

The court disposed of the case by saying:

"It was error to deny the appellant's motion for judgment on the answers to the interrogatories notwithstanding the general verdict.

"Judgment reversed, with instructions to enter judgment for the defendant on the answers to the interrogatories."

In the case of *Scott* v. *Kurn et al.*, (Mo.) 126 S. W. 2d 185, the plaintiff drove a truck distributing gasoline in the Town of Cuba, Missouri. Under the Missouri law such operators of gasoline trucks were required to exercise the highest degree of care in crossing railway crossings. A collision occurred when he drove his truck in front of one

of the defendant's passenger trains. There was a sharp dispute upon the question as to whether or not the defendant railroad company was negligent. As plaintiff approached the track with his truck, there was an oil tank car upon a switch track about 75 feet west of the highway over which he was traveling. Plaintiff testified that he slackened the speed of his truck and was listening and looking for trains but admitted that he did not stop his truck before he attempted to drive over the crossing. Because of the rule requiring him to exercise the highest degree of care, the Missouri Supreme Court held that he should have looked after he got past the obstruction of the tank car, even though the distance within which he would have such view was rather small, and although in the trial court the verdict of the jury was for the defendant, the Missouri Supreme Court in affirming the judgment for defendant held that plaintiff was guilty of negligence as a matter of law. The track was straight for more than 800 feet from the crossing in the direction from which the train came. There was a distance of 9 feet between the nearest rails of the switch track and the main line track, and the distance from the bumper of the truck to where plaintiff was seated in his truck was 7 feet 10 inches. The Supreme Court stated:

> "* * * We are of the opinion that these physical facts and the evidence of plaintiff convict him of negligence as a matter of law. It was plaintiff's duty to exercise the highest degree of care. Ordinary care would have required him to look to the west for an approaching train. Plaintiff could have at a glance seen the train in full view, before the front wheels of his truck reached the south rail of

> the main line track. Note again that there was a space of nine feet between the rails; that plaintiff was sitting in a seat the back of which was less than eight feet from the bumper of the truck; that the tank car was more than seventy-five feet to the west of him. * * *"

In the case at bar the deceased, John T. Toomer, if he elected to proceed in the face of a warning signal would be chargeable at least with exercising the highest degree of care in doing so and not just ordinary care. He had as much if not more opportunity for view as either of the truck drivers in the two cases last mentioned and his duty to exercise extreme care would be as great. He could not proceed blindly past the freight train standing on the passing track, nor could he proceed over the crossing without slackening his speed so that he would have some view after he had passed the standing freight. Measurements on Exhibit 1, which is drawn to scale, even assuming that the front of the engine was at a point where the witness Harmon, son-in-law of deceased, measured, namely 32 feet south of the end of the planking, will show that had Toomer been paying any attention at all and had he attempted to look to the south at all as he passed in front of the freight train, he would have been able to see past the front of the freight train and down the main line track for a distance of approximately 200 feet before he had crossed over the passing track on which the freight train was located and when he would still have been 15 feet from the main line track. Had he paid any attention to the signal and decided nevertheless to cross in spite of the warning signal, it would have at

least been his duty to proceed slowly and to keep a vigilant lookout to the south and have his truck under such control that he could bring it to a stop in the event a train was approaching on the main line track. There is no escape from the conclusion, under the facts shown by the record in this case, that in the face of such warning signal Toomer should be held to have proceeded at his peril.

The rule as stated in Corpus Juris was quoted in the case of *Scott* v. *Kurn,* supra, as follows:

> "The presence of standing cars at a crossing is a notice of danger, calling on the traveler to exercise the greater care which ordinary caution requires; and where the view of one about to enter upon a railroad crossing is obstructed by standing cars, if he attempts to cross without exercising proper care to look and listen for the purpose of discovering an approaching train as soon as it can be seen, as immediately after reaching the end of, or passing, the standing cars which obstruct his view, and if, where necessary to do so, he fails to stop to look and listen for the purpose, he is chargeable with contributory negligence precluding recovery, notwithstanding negligence on the part of the railroad company in failing to sound the proper warning signals."

If this be true as a general rule, then where there is a warning signal being given as was true in the case at bar, a traveler should be held to proceed at his peril. It must be remembered that the statute not only requires the driver to stop but states that he must not proceed "until he can do so safely." The burden is thus on him not to determine whether he may have a margin of safety, and not to guess

or speculate as to whether he might make it across, but that he "shall not proceed until he can do so safely."

In the case of *Shelby* v. *Southern Pac. Co. et al.,* (Cal.) 157 P. 2d 442, the California law provided that any vehicle carrying inflammable liquids should stop not less than 10 nor more than 50 feet from the track, and while so stopped listen and look in both directions. Failure to stop constituted a misdemeanor. Shelby attempted to drive a truck loaded with kerosene across the tracks at about 3:30 a.m. and collided with the tender of an engine which was backing over a spur track across the intersection. Shelby did not bring his vehicle to a stop as required by the statute. The trial court directed a verdict in favor of the defendant, and the appellate court affirmed the trial court's judgment, saying:

> *"The statutory inhibition of an act by the imposition of a penalty for its violation creates an absolute standard of behavior.* In forbidding a kerosene-laden motor truck to cross a railroad track without first stopping, section 576 establishes a rule of the road which is not debatable. * * * That such a stricture upon the transportation of specified commercial cargoes imposes hardships upon drivers of such motor trucks in traversing a boulevard which is crossed at frequent intervals by spurs off a main line railway is no excuse for violating the statute. The driver of such a truck is not excusable because he does not see the track."

The appellate court also stated:

> "* * * *That the failure of Shelby to stop before crossing the track caused or contributed to cause the accident is not open to argument. There*

would have been no collision if the truck had stopped ten feet south of the point of its attempted crossing." (Italics ours.)

The last statement is very much in point in the case at bar. The testimony shows that the contact points which would start the wigwag signal to working were 1,650 feet from the crossing (R. 338). Thus should we assume the train to have been going at the fastest rate of speed stated by plaintiff or any of his witnesses—60 miles an hour—it would have taken slightly in excess of 18 seconds for the train to reach the crossing after the signals started to operate. If the train had been going no faster than the 30 miles an hour which the city ordinance provided, it would have taken the train only 37 seconds to reach the crossing. Thus any inconvenience that Toomer may have suffered in stopping for the signal would have continued for only slightly more than a half minute, whereas plaintiff's witness Cozzins stated that he stopped and waited for two or three minutes before proceeding, not because of any warning from the wigwag signal because he did not observe such, but he stopped because of the freight train.

Regardless of the speed at which the train may have been traveling, if it had been going 60 miles an hour it would have taken only 18 seconds to reach the crossing; if it had been going 30 miles an hour it would have taken 37 seconds; and if it had been going 50 miles an hour it would have taken 22 seconds to reach the crossing. Thus by paraphrasing the last statement given from the *Shelby* case, we must conclude: "that the failure of Toomer to stop before crossing the track caused or contributed to

cause the accident is not open to argument. There would have been no collision if he had stopped his truck 10 feet west of the point of its attempted crossing."

In *Lake Motor Freight Line* v. *New York Cent. R. Co.*, (Ind.) 90 N. E. 2d 512, a similar statute was involved, requiring a driver to stop and not to proceed until it was safe to do so. Plaintiff's truck driver was killed in a collision at the crossing. It was contended that the passenger train involved in the collision was traveling in excess of the 25 miles per hour speed limit set by the city ordinance; that the defendant obstructed the view of the approaching passenger train by having a long freight train on a side track; that the freight train caused the crossing signal to operate for some time prior to the collision, causing a situation which was misleading and confusing; and also that the railroad company violated its own safety rules concerning protection of the crossing.

The question of whether or not the automatic signal at the crossing was in operation and whether or not the deceased stopped, and the speed of and whether or not signals from the train were given, were all in dispute, and the evidence with respect thereto was conflicting. The matter was submitted to a jury on a charge including special interrogatories. The jury gave a verdict for the defendant, and the Indiana Appellate Court in affirming the trial court's judgment thereon said that the essential facts to sustain the jury were found in the answers to special interrogatories wherein the jury found that (1) the crossing signal was in operation and (2) flashing continuously

until the time of the collision; (3) the crossing bell or gong was ringing; (4) the deceased did not stop his truck before attempting to cross the tracks; (5) the freight train was moving towards the crossing about 150 feet away; and (6) the whistle on the passenger train was sounded. These facts having been found by the jury were considered by the appellate court sufficient to sustain the judgment.

In the case at bar (1) there is no dispute that the wigwag was in operation; (2) the red light in the center of the wigwag was on and swinging back-and-forth; (3) the crossing bell was ringing; (4) the deceased, Toomer, did not slow down or stop prior to attempting to cross, nor did he slow down in traveling to the point of collision; (5) there was a dispute as to the location of the freight, but there is no dispute over the fact that it had not caused the operation of the wigwag—it could not have done so—and therefore there was no question in the case at bar of continuous operation of the wigwag that would require a traveler to wait any excess time; and finally (6) the whistle and bell on the Streamliner were being sounded continuously, and the whistle at least was heard by nearly everyone else in the vicinity; and this plus the fact that the freight train gave a warning to travelers by one or more toots of its whistle.

In the case of *Miller et al.* v. *Chicago, R. I. & P. Ry. Co.*, (S. D.) 40 N. W. 2d 324, the plaintiff was driving a gasoline transport in a southerly direction and was struck by defendant's engine going east. South Dakota law provided that before crossing the railroad tracks he should

stop and not proceed until he should ascertain he could do so safely. There were obstructions to view as he approached the crossing. There was no wigwag or mechanical signal at the crossing. When plaintiff arrived at a point 50 to 75 feet north of the crossing, he saw defendant's engine 35 to 45 feet west of the crossing and he thought it was standing stationary. He heard no whistle or bell or other warning from the train so proceeded without stopping. As the front wheels of his tractor-trailer came upon the rails, he saw the engine moving down upon him. He had stopped half a block away where there were industry tracks but did not stop again for the main line track. He sought to excuse himself because of traffic following him, which by his stopping might be stopped on the industry tracks, and also because no signal was given. The trial court submitted the case to a jury which returned a verdict for plaintiff. The South Dakota Supreme Court reversed the trial court on the basis that plaintiff was negligent as a matter of law. We quote from the opinion:

> "* * * The duties imposed upon him were two: first, to stop; second, 'to ascertain when such crossing can be made in safety.' * * * It must be conceded that had Miller conformed to the required standard plaintiffs' gasoline transport, loaded with inflammable liquid, would have escaped the damaging impact with defendant's engine.
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> * * * * *
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> "The effect of the statute is to require of the drivers of loaded gasoline transports the utmost care on their part in avoiding collisions with railroad engines, trains, etc. The law was intended to eliminate the consequences of disasters involving or likely to involve the public. To accomplish this aim

> the clear command to the driver of a loaded gasoline transport is that he first stop and then find out that he will encounter no danger if he crosses the tracks. Should we interpret the applicable code provisions as contended by plaintiffs' counsel the result would be a substitute for that which is plainly written into law and a lower standard of conduct for drivers of the special class now charged with the duty to avoid the common danger at railroad crossings. *But a little tinkering with the clause of the statute, I. E., 'to ascertain when such crossing can be made in safety,' would reduce the legislative mandate to the general rule governing the conduct of drivers of ordinary motor vehicles.*" (Italics ours.)

It may be argued that such a case is not applicable here because there is more danger to the general public with a loaded gasoline transport. There is the same danger of disaster to any individual who attempts to proceed over a crossing in the face of a mechanical signal, and our law gives the definite command that he must stop and not proceed until he can do so safely. It does not say he must stop and then proceed with due care, or that he can then proceed even if using the utmost or highest degree of care, but the law says he must STOP AND NOT PROCEED UNTIL HE CAN DO SO SAFELY. Clearly, one who neither stops nor proceeds with caution cannot be excused, and where Toomer neither slowed nor stopped, but proceeded over the crossing at 25 or 30 miles an hour, reasonable minds could not differ but would be compelled to hold him guilty of negligence as a matter of law.

The *Miller* case goes on to state:

> "* * * 'The command is that the driver shall not proceed until he knows that to proceed is safe.

* * * He had no right to assume what he could not know.' * * *

"Miller took a chance on a guess and he now argues that the wrong guess was justifiable. It was either safe or dangerous for him to go forward. *The law says he was bound to know that it was safe and that he must stop in order to acquire the knowledge of safety. He did not stop and it is obvious that he entered a path of danger assuming instead of knowing that harm would not result from his traversing that path with his extended and heavily laden transport. A brief pause would have enabled him to know of the danger he assumed not to be impending. His failure to stop and to ascertain that it was then safe for him to cross the tracks fell far short of the duty the law expressly imposed upon him and constituted negligence contributing to the harm which thereupon and therefrom ensued.* (Italics ours.)

"The judgment appealed from is reversed and the case remanded with directions to dismiss plaintiffs' complaint."

With respect to Mr. Toomer in the case at bar "the law says he was bound to know that it was safe and that he must stop in order to acquire the knowledge of safety. He did not stop and it is obvious that he entered a path of danger assuming instead of knowing that harm would not result." We do not know what Toomer assumed, if anything. There is no evidence that he assumed that the freight was activating the signal and he would not have been justified in so assuming and proceeding blindly without slackening his speed. *"A brief pause would have enabled him to know of the danger he assumed not to be impending. His failure to stop and to ascertain that it was then safe for him to*

cross the tracks fell far short of the duty the law expressly imposed upon him and constituted negligence contributing to the harm which thereupon and therefrom ensued."

Quite a number of courts have held it to be contributory negligence as a matter of law where a driver proceeds over a crossing in the face of an operating mechanical signal, without reference to the question of whether or not there is a statute requiring the driver to stop or setting any criminal penalty for a violation of any law requiring a stop.

In the case of *Larsen* v. *Grand Trunk Western Ry. Co.*, (Mich.) 227 N. W. 665, the court stated:

> "Plaintiff, on his way to work, just before daylight, driving his automobile on a street in Flint, came to a railroad crossing of defendant. The crossing was protected by a lighted wigwag and a bell. The positive testimony, against which the negative testimony made no issue, is that as plaintiff approached the crossing the bell was ringing and the wigwag was operating, showing a red light. The crossing was near a large automobile plant. The night shift was leaving, and the day shift entering. Many automobiles were in the street, to which plaintiff, in driving, gave his attention. A sudden movement of an automobile ahead caused plaintiff to stop, and in doing so he stalled his motor. He stopped on the crossing. The train was approaching on a curve. There were cars on a side track. At what distance from the crossing the enginemen might have observed plaintiff's peril the record is not clear. Probably it was nearly 400 feet. Perhaps, on plaintiff's own testimony, it was much less. At the conclusion of plaintiff's case a verdict was directed for defendant. Plaintiff brings error."

It was argued that the railroad company should have been liable under the last clear chance theory, but the Supreme Court of Michigan stated: "The record is barren of evidence to sustain this theory." On the question of negligence and contributory negligence, disregarding the last clear chance, the Michigan Supreme Court concluded:

> "* * * If defendant's negligence be assumed, plaintiff's contributory negligence precludes recovery. The record shows an almost total failure of plaintiff to take precaution for his own safety, and a lack of proper attention to the crossing and its warnings.
>
> "We find no error.
>
> "Judgment affirmed."

In *Nice* v. *Illinois Cent. R. Co.*, (Ill.) 25 N. E. 2d 104, plaintiff's deceased, a trucker, was killed when his truck collided with defendant's fast passenger train in the Town of Chestnut, Illinois, just before noon of a February day. There was a mechanical wigwag signal with a bell at the crossing, and all witnesses except a daughter of the deceased testified that it was in operation at the time of the accident. There were buildings which obstructed the view of the track as one approached, then a space of about 20 feet where one could see. Thereafter there were more obstructions, including a depot building belonging to the defendant company which obstructed the view until one was about 15 feet from the main line. The passenger train involved did not stop in the Town of Chestnut and was traveling at the rate of 90 miles per hour. The grounds of negligence charged were excess speed of the train, failure to have a flagman, and also that the wigwag was not properly located for a traveler to see.

It was contended that the Chestnut station agent usually acted as a flagman at the crossing when fast trains were due. The Illinois Appellate Court dismissed this contention briefly by saying:

> "The record is bare of any evidence tending to show that appellee's intestate had any knowledge of such custom or relied upon the same. * * *"

In the case at bar there was no evidence that the wigwag either at the time of the accident or at any other time had operated excessively or that it had operated when a train was on the passing track, and there was no basis for contending that Toomer assumed or had any right to assume that the standing freight was operating the wigwag. All of the evidence is to the contrary, and from the facts it is conclusive that if Toomer had stopped at all in response to the wigwag—even for five seconds—he would have saved himself.

In the *Nice* case, the trial court submitted the matter to a jury which returned a verdict for plaintiff, but the Illinois Appellate Court held the deceased to have been guilty of contributory negligence as a matter of law and reversed the trial court. The Appellate Court stated:

> "* * * in this case we have the picture of a man driving onto a railroad track in the face of many warning signals. The wigwag was in operation, the automatic crossing bell was ringing, a 'stop' sign and a standard railroad sign with crossarms was placed at the crossing within easy view of the driver, * * * as well as the horn or whistle and the automatic bell on the engine sounding continuously. Most of these warnings were seen and heard by

> many people for a distance of 100 feet and over. To utterly disregard all of these signals and warnings seems to us to indicate an entire absence of due care. * * *
>
> "The fact that from a certain point in the highway the view of the wigwag was obscured to the driver of an automobile did not in any manner relieve him of the duty to use due care commensurate with the circumstances. Sunnes v. Illinois Cent. R. Co., 201 Ill. App. 378.
>
> "* * * The question of due care on the part of a plaintiff is a question for the jury when there is any evidence given on the trial which, with any legitimate inference that may be legally and justifiably drawn therefrom, tends to show the use of due care; but where the evidence, with all legitimate inferences that may be legally and justifiably drawn therefrom, does not tend to show due care on the part of plaintiff, the trial court is justified in instructing the jury to return a verdict for defendant."

In the case at bar there were numerous warnings which Toomer could have heeded in addition to the wigwag. The freight train whistled one or more times, (R. 115, 220, 249) and the Streamliner whistle was sounding continuously and was heard by all of the men in the cab of the freight engine as well as others driving motor vehicles in the area, some several blocks to the east of the crossing. Mrs. Sparks crossed over the main line and then turned around, looking to the south toward the approaching Streamliner. The testimony is that she turned and faced the west, but she said she was watching the approaching Streamliner and did not even see Toomer until the actual moment of the collision. Her turning and looking in the direction of the

approaching train should in itself have given some additional indication to Toomer. There was no claim here that the wigwag was not properly located, nor any reason given why Toomer should not have seen or observed it and obeyed its warning. As was said in the *Nice* case: "Most of these warnings were seen and heard by many people for a distance of 100 feet and over. To utterly disregard all of these signals and warnings seems to us to indicate an entire absence of due care."

In the case of *Rothstein* v. *Boston & Maine R. R.*, (Mass.) 2 N. E. 2d 205, Rothstein was killed in a grade crossing collision with defendant's passenger train on a September night at the "State Street Crossing" in the Town of Newbury, Massachusetts. Three sets of railroad tracks ran north and south, and the highway crossed from northeast to southwest. The truck was traveling in a southwesterly direction and the train was going north. It was admitted in the case by plaintiff's counsel in his opening statement to the jury that automatic red flasher lights at the crossing were in operation and flashing their signals as deceased approached. However, there was testimony to the effect that trains were shifting back and forth north of the crossing on the side from which the deceased approached. The engineer and fireman testified that the whistle was blown and the bell ringing on the passenger engine, but other witnesses in the vicinity testified that they heard no bell or whistle, this latter testimony being purely of a negative character. There was also some testimony that there was a flagman at the crossing. Some of the witnesses saw him there after the accident, and some said he had a white

light and was swinging it in such a way as to invite one to proceed over the crossing. The trial court denied a motion for a directed verdict and submitted the case to a jury, which returned a verdict for plaintiff. The Massachusetts Supreme Judicial Court reversed the trial court and stated:

> "A finding of negligence on the part of the defendant was not warranted. The evidence in its aspect most favorable to the plaintiff shows that his intestate was guilty of contributory negligence as matter of law. (Cases cited.) The exceptions to the refusal of the trial judge to grant the defendant's motion for a directed verdict on the second count of the amended declaration must be sustained. In view of the conclusion reached, the other exceptions of the defendant need not be considered. Judgment is to be entered for the defendant."

In the case of *Texas & Pacific Ry. Co.* v. *Day,* (Tex.) 193 S. W. 2d 722, the railroad tracks ran east and west and the street north and south. There were three tracks from south to north as follows: a team track, then a passing track, and then the main line. There was a space of about 10 feet between the passing track and the main line. The crossing was protected by automatic flashing lights which would be activated by main line trains within half a mile of the crossing. The lights, however, would also be activated by cars or trains on the side tracks within 30 feet of the crossing. Plaintiff approached the crossing from the south and a train was proceeding east on the passing track. Plaintiff stopped to wait for the passing train and as it cleared the crossing by 50 or 60 yards, he said he looked, saw nothing, and started to cross. The Appellate

Court said that there was no question but what the flasher lights were working at the time because the lights were activated by switching trains and cars on other tracks, and there was testimony that the lights were flashing nearly all of the time and that no one paid any attention to them at all. The trial court submitted the case to a jury, which returned a verdict for plaintiff. The District Court of Appeals held the plaintiff to be guilty of negligence as a matter of law and reversed the trial court. We quote from the opinion:

> "A careful consideration of the testimony as a whole and the testimony of plaintiff himself compels the conclusion that he either failed to look for the warning signals or saw and ignored them.
>
> *"Crossing signals that fail to function as designed are a source of danger rather than safety. On the other hand, a disregard for properly functioning signals is a source of great danger. The trains are operated in reliance on the motorist heeding such signals and governing his conduct thereby.* (Italics ours.)
>
> "In essence there can be but little difference between a motorist disregarding the signal of a flagman not to cross and disregarding an automatic signal so warning him. No doubt on occasions one may cross an intersecting railroad track in face of a flagman's signal not to do so. These signals, whether given by flagmen or by automatic devices, should and no doubt do allow a margin of safety. In the case of St. Louis B. & M. R. Co., et al. v. Paine, Tex. Civ. App., 188 S. W. 1033, this court in somewhat analogous situation held as a matter of law that plaintiff was guilty of contributory negligence."

It is interesting to note that in this case the Texas court said there was no general law in Texas making it a penal offense to cross in the face of a warning light. The court nevertheless held the plaintiff guilty of negligence as a matter of law. By the very statement as quoted above and just referred to, the inference is given, which is in accord with the general rule, that if there is a penal offense provided by statutory or other law, then violation of such law is negligence per se.

The law applicable to the case at bar does provide a penal offense. Section 57-7-224 provides that any violation of the act is a misdemeanor. Therefore, it was negligence per se for Toomer to attempt to drive over the crossing in question in face of the wigwag light and bell without stopping and without waiting until he could and did determine that it was safe for him to do so.

We quote further from the opinion of the *Day* case:

> "It is true that on either the team or passing track a standing car or train within thirty feet of either side of the crossing would activate the lights; that a train on the main track in approximately half a mile of either side of the crossing standing still would activate the lights. However, those lights were intended to warn of the approach of a train in dangerous proximity to the crossing. This the plaintiff understood. There is, as we have stated, no substantial evidence that the defendants kept these lights flashing at all times or any considerable portion of the time; no evidence that they flashed save when it was necessary to warn the public that the crossing was dangerous. That other persons on other occasions had passed over this crossing in

disregard of the light, in our opinion has no bearing on the issue. These grade crossings are common throughout the entire country. In many cases, no doubt, they are what might be termed a necessary evil. The jury found here that this was an extra hazardous crossing. If there be evidence to sustain this finding (and same is not attacked), then this we think would not excuse the plaintiff from the exercise of all care. Had he heeded these warning lights he would not have received the severe injuries he did suffer. Even after he had crossed the team track and the passing track there was time for him to have still saved himself had he heeded the signal. It is fair to assume, we think, that as he crossed over the team track he could see there was no train approaching within dangerous distance on that track; the same when he crossed the passing track, and then the only danger indicated was from the main track, and he deliberately drove on to same in front of a passing train in the face of a warning that it was near. In attempting to make this crossing, under the circumstances, plaintiff recklessly and carelessly speculated with his own safety. The cases cited below are deemed to support our finding that plaintiff was guilty of contributory negligence as a matter of law, and can not recover. (Cases cited.) The long and short of the matter is that in absolute disregard of signals to refrain from going upon the track on account of the imminent approach of a train plaintiff drove thereon and suffered the serious injuries complained of. His action amounted to contributory negligence as a matter of law."

See also *Poague* v. *Kurn,* (Mo.) 140 S. W. 2d 13, where without reference to any statute the court held the plaintiff to have been guilty of contributory negligence as a matter

of law where he attempted to drive over a crossing in the face of an operating wigwag signal.

It will be contended by plaintiff that the fact that there was a stormy condition present would make some difference. There is some dispute with respect to the condition of the storm but the most that can be said with respect to the testimony of any of plaintiff's witnesses is that one or two of them gave a general conclusion that "visibility was poor." The other testimony, however, shows that the storm was not very effective as far as obstructing any view of travelers approaching the track. Plaintiff's witness Cozzins had no difficulty in seeing the train between the depot and the water tank. Harmon testified that one could see at least up to 200 yards (R. 188). The witness Curtis had no difficulty seeing the train as he was approaching the crossing, and he was 5 or 6 blocks away coming from the east part of town in his automobile. He even saw the train as well as heard its whistle when it was a mile away at the Olsen crossing (R. 146). Regardless of the condition of the weather, however, rain, fog, snow or other storm does not excuse one approaching a railroad crossing from the exercise of due care but instead imposes upon such traveler the duty of exercising greater care.

In the case of *Shaw* v. *Chicago & E. I. R. Co.*, (Ill.) 75 N. E. 2d 51, the court said:

> "* * * It is true that the mist and fog and rain may have to some extent interfered with her vision, but if so, this required a greater degree of care on her part."

That was a case where the trial court had granted judgment for the plaintiff. The Illinois Appellate Court reversed the trial court and directed judgment for the defendant.

In the case of *Papageorge* v. *Boston & M. R. R.*, (Mass.) 57 N. E. 576, the court said:

> "There was no traffic moving in the vicinity of the crossing just before the accident except the train and the truck. There is nothing in the record to suggest that the crossing was a noisy place. The plaintiff, according to his own testimony, knew that a train was due, and there was nothing to distract his attention or to prevent him from exercising an appropriate degree of watchfulness as he approached the crossing. If his range of vision of the approaching train was restricted by the storm, then he should have adopted such other reasonable measures as common prudence dictated in order to ascertain if it were safe to cross. (Cases cited.)"

See also *Negretti* v. *Baltimore & O. R. Co.*, (Md.) 16 A. 2d 902.

Regardless of the fact that there was a spring storm in progress, such storm was not sufficient to obscure a view of the wigwag, and it would not in any manner affect the hearing of one situated as Toomer was had he but stopped to listen. The witness Harmon, Toomer's son-in-law, testified that the visibility was not limited short of 200 yards (R. 188). That would have been sufficient to enable Toomer to see an approaching train in spite of the storm had he proceeded slowly over the crossing. He would, in all events, have been able to see the wigwag, swinging

disk and light, and to hear its bell, and if he had stopped in response thereto, there is no question but what he would have heard the Streamliner whistle.

The trial court should have directed a verdict in favor of the defendant and against plaintiff and should have given to the jury defendant's Instruction No. 1 as requested. The court committed reversible error by refusing to do so.

POINT II

THE TRIAL COURT ERRED IN INSTRUCTING AND ALLOWING THE JURY TO FIND THE DEFENDANT GUILTY OF NEGLIGENCE EVEN THOUGH THE JURY SHOULD FIND THAT THE TRAIN ENTERED THE CROSSING AT A SPEED OF 30 MILES AN HOUR. (Statement of Errors No. 3 and No. 5.)

There was testimony from defendant's witnesses in the case at bar from which the jury could have concluded that the Streamliner train was not exceeding the speed limit of 30 miles per hour at the time it entered the crossing (R. 290, 291). Nevertheless, by Instructions No. 10 and No. 23, and particularly by subparagraph (b) of each of said instructions, the court authorized the jury to find the defendant guilty of negligence on the basis of speed alone even though the train came onto the crossing at 30 miles an hour, which admittedly was within the speed limit, the court stating that the jury could so find "in view of all of the conditions then existing."

In Instruction No. 13, subparagraph (i), the court instructed the jury that darkness or stormy weather alone in the vicinity of the crossing when the wigwag signal was in operation was not a condition that should be considered as unusual, and we submit in that particular portion of the instruction the court was correct. However, such instruction when read with Instructions No. 10, No. 23, and other portions of Instruction No. 13 is very conflicting.

Let us find out just what were the conditions at the crossing that could have been referred to by the court in Instruction No. 10. There was no excess amount of travel either on the highway or over the rails shown in the evidence, and there was no noise at the crossing either from industries located in the area—of which there were none—or from other traffic. There were no traffic noises. The only noise there was, if any, in the vicinity of the crossing was the noise from the wigwag and ringing bell at the crossing and such noise as would have been made by the whistle of the approaching Streamliner or the Streamliner's bell. There was not even any testimony that the freight train standing at the crossing made any noise, and all three of the occupants in the cab of the freight engine who would be affected more by the noise, if any, that might be made by the engine, all heard the signal at the crossing and the signals from the approaching Streamliner.

A speed of 30 miles an hour would not have been in violation of any city ordinance or any law referred to in the case at all. It is uniformly held by the courts in these modern days that speed of a train in and of itself is not

negligence, and unless there is a failure to sound signals on an approaching train or unless there is noise at a crossing or something at the crossing which would render ordinary signals indistinct so that they would not be heard, or unless the crossing is shown to be unusually hazardous by reason of excess traffic thereon, it is not negligence to run such train at any speed the railroad company may choose.

In the case of *New York Cent. Ry. Co.* v. *Powell,* (Ind.) 47 N. E. 2d 615, the accident in question occurred at a crossing in a residential portion of a town of 600 population. The court held:

> "Speed of itself never constitutes negligence in the absence of a limiting statute or ordinance. We must reach the same conclusion as the court did in Union Traction Co. v. Howard, Adm'r, 1910, 173 Ind. 335, 340, 90 N. E. 764, 765, in which it is said: 'We think there is but one act of negligence alleged; that it requires the concurrence of a high and dangerous rate of speed, coupled or concurring with a failure to give warning, to constitute the negligence charged.' * * *"

In *State* v. *Poe et al.,* (Md.) 190 A. 231, Poe was driver of a bus transporting a group of school children returning at about 11:30 P. M., when in crossing the Baltimore & Ohio Railroad tracks in the Town of Rockville the bus was struck by a Baltimore & Ohio passenger train traveling 58 or 59 miles per hour. There were no flashing lights at the crossing, but there was a gong or crossing bell which was in operation at the time of the accident, and there was a red lantern which a flagman had left burning there. The plain-

tiff's testimony as to lack of signals both at the crossing and from the train was all negative, and the Maryland Appellate Court said that in the face of positive testimony to the contrary, it did not even raise a question for the jury. It was raining at the time of the accident, but the Appellate Court said that if the driver had stopped he would have been able to hear the signals.

With respect to the speed of the train the Maryland Appellate Court referred to the fact that there were automatic bells ringing at the crossing, plus the whistle on the locomotive which was sounded and the locomotive bell which was ringing, and the court said:

> "* * * All these precautions were taken and all these warnings were given at the time of the accident, *and they furnished adequate and opportune warnings of approaching trains, no matter their speed.* The crossing was one where a traveler would anticipate the passage of fast trains. It follows that, under these circumstances, a recovery cannot be had on the speed of the train. (Cases cited.)" (Italics ours.)

In *Plough* v. *Baltimore & Ohio R. Co.*, 172 F. 2d 396, the Federal Court of Appeals of the Second Circuit reversed the trial court for submitting an instruction to a jury which allowed the jury to find the railroad company guilty of negligence on the question of speed alone when there was no statutory regulation as to speed and where the question of speed was not tied in with the failure to give proper signals.

In the case at bar there is no dispute as to proper signals having been given from the train. In addition to

that fact the crossing was protected by a wigwag containing a swinging light and a bell, yet the court by Instruction No. 10 allowed the jury to find the defendant negligent regardless of warnings and signals even though the jury should find that the speed of the train was not in excess of 30 miles an hour and therefore not in violation of any law or ordinance.

The pictures, Exhibits 3, 6 and G, show that while this crossing is in the edge of Cokeville it also borders on country area, and with the wigwag protecting the crossing could be considered similar to an ordinary country crossing.

In *Canion* v. *Southern Pac. Co.,* (Ariz.) 80 P. 2d 397, with respect to a charge of excess speed, the court stated:

> "* * * It is too well known for us to refuse to take judicial notice of the fact that trains of this nature are universally scheduled to travel at a high rate of speed, and partciularly so in sparsely settled and outlying country districts. If such speed in such districts were of itself negligence, there can be no doubt that the various railroad commissions, which are so zealous in guarding the rights of the public, would have prohibited a speed so universally employed. We are clearly of the opinion that the admitted speed of the train at the time and under the circumstances was not, as a matter of law, negligence unless it were shown affirmatively that there were some circumstances existing at the time which should have caused the engineer to slacken his speed. There was no evidence of this nature."

The testimony in the case at bar shows that Cokeville had a population of approximately 500 people (R. 195), and in the main, people who went back and forth over the

crossing were ranchers. The witness Harmon stated that approximately half of the people of Cokeville lived to the west of the crossing, but the pictures above referred to show the contrary and show that the crossing is in the extreme west edge of town.

In the case of *Nice* v. *Illinois Cent. R. Co.*, (Ill.) 25 N. E. 2d 104, the accident occurred in the Village of Chestnut, Illinois, which contained about 300 people. In that case the train was going 90 miles an hour, and with respect to a charge of exceed speed, and in holding the driver of the vehicle involved to have been guilty of negligence as a matter of law, the Illinois Appellate Court stated:

> "It is hard for this Court to see in this day and age, and under the circumstances proven in this case, how it can determine that it is negligence per se to operate a train at the rate of 90 miles per hour through the Village of Chestnut."

See also *Carter* v. *Pennsylvania R. Co.*, (Sixth Circuit Ct. of App.) 172 F. 2d 521.

It was prejudicial and reversible error for the court under the facts shown by the record in this case to allow the jury to find the defendant guilty of negligence if it operated the train over the crossing at 30 miles an hour.

POINT III

THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY THE QUESTION OF WHETHER OR NOT THE DEFENDANT ADEQUATELY

WARNED TRAVELERS ON THE HIGHWAY APPROACHING OR INTENDING TO USE THE FIRST STREET CROSSING. (Statement of Errors Nos. 4, 6, 8, 9, 10, 11, 12 and 13.)

There is no dispute in the evidence in this case with respect to the warnings which were actually given and there is not sufficient in the record from which the jury could have found otherwise than that the whistle on the Streamliner passenger train was sounding almost continuously as it approached the crossing, the bell on the Streamliner was operating, and the wigwag was swinging back-and-forth with the light in the center on red and the bell in the mechanism ringing. In addition, the freight train standing south of the crossing sounded one or more blasts of its whistle. WE REPEAT, THIS EVIDENCE IS NOT CONTRADICTED. There were some of the witnesses who did not hear the bell on the Streamliner engine, but none attempted to say that it did not ring. Not all of the witnesses heard all of the whistles on the Streamliner, but several—both of plaintiff's and defendant's witnesses—testified to hearing several whistles from the Streamliner. Even the witness Mr. Harmon, who saw the Streamliner momentarily and attempted to judge its speed, did not say that the Streamliner had not whistled. In the face of this evidence, there was no basis whatsoever for the court to submit to the jury any question as to whether or not the defendant had "adequately warned" drivers of motor vehicles of the approach of said train.

It was not at any time claimed that railroad traffic over the crossing was excess, and in fact the amount of

railroad traffic over the crossing was not shown at all. It was alleged in the complaint that First Street carried a large amount of vehicular traffic, but the only testimony with respect to that was that 10 or 15 vehicles an hour passed back-and-forth over the crossing (R. 201). This would mean approximately only one vehicle in five minutes.

We have already referred to the fact that there were no industries surrounding the crossing which would create any noise, and there were no facts in evidence which would tend to indicate that the Streamliner whistle could not or would not have been heard had Toomer only stopped to listen. Clearly, there could not by any stretch of the imagination be anything gleaned from the records in this case as to why Toomer did not or could not have seen or heard the wigwag signal at the crossing. If there had been any dispute in the evidence concerning the wigwag or bell at the crossing, or if there had been any dispute concerning signals that were given by the Streamliner engine, then the question might have been different and might possibly have been submitted to the jury.

The question of signals or warnings in addition to those usually given is only material when the crossing is alleged to be and there is proof that it is an exceptionally or unusually dangerous one, and where the normal warnings usually given at a crossing would be difficult to be heard by a person using due care, but where there is neither pleadings nor proof to that effect and it is shown that in addition to normal signals a wigwag light and bell is in operation at the crossing, such warnings are as a matter

of law sufficient, and submitting the question of additional warnings, or allowing the jury to speculate concerning additional warnings, constitutes prejudicial error.

As was said in the case of *State* v. *Poe et al.*, (Md.) 190 A. 231, supra, "All these precautions were taken and all these warnings were given at the time of the accident, *and they furnished adequate and opportune warnings of approaching trains, no matter their speed.*" (Italics ours.)

In the case of *Markar* v. *New York, N. H. & H. R. Co.*, 77 F. 2d 283, a crossing collision occurred after dark. It was shown that there were no obstructions to view and in daylight one approaching the track could see along it for 1,000 feet. However, the accident happened after dark and it was claimed that the train had no headlight and did not ring a bell or sound a whistle; also that the train was running at excessive speed. In addition to these claims, it was charged that the crossing was extra-hazardous and was not adequately protected. It appeared in evidence that there were flasher lights on one side of the highway only, although having lights facing in each direction along the highway. There was no bell at the crossing. The trial court submitted the case to a jury, which returned a verdict for plaintiff. The Federal Court of Appeals reversed the trial court stating: "It was error to permit the jury to find negligence based upon an insufficiently protected crossing." We quote the following from the opinion:

> "Appellant complains that the court should not have permitted the jury to find as an element of negligence that the crossing was insufficiently protected. The blinker at the crossing was installed in

1923 pursuant to the order of the Commission, and the appellees claim that while it might have been sufficient at that time, with the increase in traffic over this highway it was insufficient at the time of the accident. The highway is a main route and a short cut to Hartford, New Haven, and shore points, and was a road used by four bus lines and many school buses. It was contended by the appellees that appellant should have known that motorists are often behind large trucks, as appellees were at the time in question, thus making it impossible to see the light on the blinker at the right-hand side of the highway, and that there should have been another blinker on the opposite side as they proceeded. In other words, that on a much traveled highway resulting in a dangerous crossing, blinker lights on both sides of the highway, or in the middle of the highway, or at a greater height above the highway, might be found to be necessary by a jury, or that an electric warning bell, flagman, or gates were necessary. The proof upon the trial may be supplemented sufficiently to indicate heavy traffic and such use of the highway as to permit a jury to find an extra-hazardous crossing requiring a higher degree of protection, either by means of an electric bell, gates, or flagman. (Citing cases.) *But the present record does not justify such a finding.* * * * (Italics ours.)

"There passed over this single-track crossing, eight schedule trains a day. It was located in the country, three miles from the city of Willimantic. Approaching the track, the traveler had no obstruction and could see in either direction a distance of 1,000 feet. In the cases we have referred to, there was some obstruction to vision. Moreover, the amount of travel over this crossing, as disclosed by evidence, is indefinite and would not permit a jury to find that more protection was necessary than that which

> concededly existed at the crossing. It is estimated that traffic increased 15 per cent over that which prevailed when the Public Service Commission issued its order as to signals at the crossing. What it was then or what it is now, was not proved. *It was error to permit the jury to find negligence based upon an insufficiently protected crossing.*" (Italics ours.)

In the case at bar we are told that Cokeville had only 500 inhabitants, and this apparently included the ranchers in the outlying districts. There were no near centers of large population such as Hartford or New Haven. The evidence as to travel showed that it was not nearly so great as in the *Markar* case, in which the court said that with proper evidence it could be shown that additional protection was needed, "but the present record does not justify such a finding."

In the case of *Schaffer* v. *New York Cent. R. Co.*, (Ohio) 34 N. E. 2d 792, a train traveling 50 to 55 miles per hour came around a curve 500 feet from the crossing. There was at the crossing the regular crossarm sign, and in addition, automatic flasher lights, which were operating at the time of the accident. It was contended that the railroad should have provided a watchman or gates, or other more effective warning. The trial court directed a verdict for the defendant, and the Ohio Appellate Court in affirming the judgment said:

> "So far as this record shows, the defendant had provided all of the warning and signaling devices at this crossing the law required. Having provided the cross sign and the flashers, did ordinary care require

more? Certainly not as to the decedent. The flashers told the driver and occupants of the Gee auto that they were at a railroad crossing, and, with the whistle, that a train was approaching. A watchman or gates could have furnished them no more information.

"In respect to signs or signals at the crossing and warnings from the locomotive, negligence of the defendant was not proven.

* * * * *

"* * * Warning signs and signals such as existed at this time and place having been provided, those operating that train were warranted in assuming that the traveling public, having been informed of its approach, would yield to it the right of way over the crossing. If this is not true and such a train must keep its speed where it can be stopped in a few feet, the essential and practical purpose of railroads is lost."

The Ohio Appellate Court held the decedent to have been bound by the warning that the automatic signal given and added:

"* * * With this information, when he went upon the track he knew he was taking a chance and he did so at his own risk. As a matter of law he was guilty of negligence which either caused or contributed to cause the fatality."

In subparagraph (f) of Instruction No. 13, the court instructed the jury that in determining whether the defendant adequately warned users of the First Street crossing of the approach of the train, they could consider whether an ordinary prudent man under the circumstances and in the position of John T. Toomer would have believed from the location and movement of the freight train that the

freight train and the freight train alone was activating the wigwag signal and was blowing all the whistles, if any, and sounding all the bells, if any, that could be heard. Such an instruction was error and highly prejudicial. The plaintiff attempted to produce testimony from one or more of his witnesses that they thought the wigwag would work when a train was on the side track (R. 117, 123, 124, 126). The court sustained objections to such testimony, and as a result the only evidence in the record is that the wigwag was not operated by trains on these side tracks and never had so operated it, and at least some of plaintiff's witnesses knew that these tracks were passing tracks and used for that purpose, and they were so stated in the complaint itself when filed (R. 2). Toomer had lived by the track for 10 years. He may have had actual knowledge, as others did, that the side tracks were used only for passing and that only main line trains activated the signal. At any rate, there is no evidence as to what he might have known or what he might have assumed. There was no evidence that there had ever been any excess operation of these signals. There was no testimony that anyone had ever seen the wigwag activated if nothing was on the main line. There was no evidence that trains were in the habit of standing with the lights operating continuously or for any excess period of time. In spite of these facts and after the court had prohibited witnesses from testifying as to what their understanding or assumption might have been as to when the signals would work, the court nevertheless submitted this instruction to the jury and let the jury thereby and without any evidence whatsoever speculate on the question

as to whether or not Toomer might have assumed that the freight train was activating the signal. There was no basis in the evidence introduced in the case which would justify submission of any such instruction to the jury. This allowed the jury the wildest type of speculation without a scintilla of evidence to go on and was prejudicial error of the worst sort.

In subparagraph (g) of Instruction No. 13, the court allowed the jury to speculate upon the question as to whether or not an ordinary prudent man in John Toomer's position would have believed there was sufficient time to safely cross all of the tracks. Such an instruction was not proper under the facts of this case. There was no testimony that Toomer knew how long the flasher light would operate and how long it would take for any train to reach the crossing or what he could base any question of time on, assuming time to cross the tracks, and in the face of evidence concerning the wigwag signal it was highly improper because the law does not allow such a person to speculate or determine whether he can cross the tracks safely without first stopping his vehicle in response to the warning. Instructions must be applicable to the facts of the instant case, and the facts in the instant case were conclusive that the wigwag signal was in operation. The statute which applied thereto set an absolute standard of conduct and that was that Toomer should have stopped and then not proceeded until he could have done so safely. If the evidence had shown that the light at the crossing had been working for some excessive period of time, and if the evidence had shown that Toomer stopped and waited and after a reason-

able length of time proceeded cautiously over the tracks, then it may have been proper for the court to submit a question to the jury as to whether a reasonable man after stopping would have concluded that it was safe to cross. BUT SUCH AN INSTRUCTION WAS NOT PROPER UNDER THE FACTS IN THE CASE AT BAR.

If the evidence had shown that the wigwag signal had been in the habit of operating excessively or for long periods of time when no traffic was moving, and if the evidence had shown that as a result of such excessive operation of the signal people generally had formed a habit of crossing in spite of the signal, there might then have been a proper basis for the court to allow the jury to speculate as to whether a reasonable man would have, under the provisions of the statute, determined that it was safe to cross (although the Texas Court held it improper to submit it to a jury even under such circumstances in *Texas & Pac. Ry. Co.* v. *Day,* supra.) ; but under the facts of this case and the applicable statutes, Toomer was bound to stop and not to proceed until he could do so safely. The statute in effect said a reasonable person should stop and not proceed until he could do so safely, and it was prejudicial and reversible error for the court to allow the jury to find that Toomer acted as a reasonable man in violating a penal statute which set out, as this statute does, an absolute standard of care.

The court instructed the jury that they could find defendant negligent for failing to adequately warn users of the First Street crossing if they found (h) lack of warning devices other than the wigwag, and in subparagraph

(i), if they found the lack of a watchman at the crossing. What evidence is there which would require "warning devices other than the wigwag, the existence of the tracks, and the presence of the freight train?" There is not one bit of evidence and no issue raised by the pleadings to show that this was an unusually hazardous crossing requiring other than normal signs erected at the crossing, and in spite of such lack of pleadings and evidence, it is undisputed that the defendant railroad company had nevertheless installed and maintained an electric wigwag signal with a swinging red light and a bell, all of which were in operation. If there had not been such automatic protection at the crossing, the pleadings and evidence were not sufficient to show this to be an extra-hazardous crossing. The only thing unusual at the crossing at all was the presence of the freight train, which admittedly constituted some obstruction, but the wigwag was ample protection with respect to that, and except for the freight train there was no obstruction to view. There was no excess traffic and no noise rendering ordinary signals indistinct or hard to hear, and there was nothing that under ordinary circumstances would require even the presence of a wigwag. The wigwag was there and it was there for the purpose of warning travelers of trains approaching on the main line while trains might be located on the passing tracks. Again we say, there was no dispute as to proper signals having been given by the approaching train and no reason for Toomer not to have heard them had he listened. If the truck was making a noise, that did not excuse him and he could have stopped and lowered his windows. All this, disregarding the question of the wig-

wag, which in and of itself was more than sufficient additional warning. There was no justification in either pleadings or evidence to warrant the court in allowing the jury to speculate as to whether the railroad company should have furnished some "warning device connected with the crossing other than the wigwag." Even a flagman could not have given a more effective warning to an approaching truck than a swinging disk with a red light and a warning bell. Had there been a flagman he more than likely would have had to get out of the way to keep from getting run over, as has been the case in some similar situations.

As a concluding paragraph to Instruction 13, the court tells the jury that if they find that an ordinary prudent careful person would not have been aware of the danger, then the defendant was negligent for not having adequately warned the deceased. The court says nothing about whether or not Toomer would have been guilty of contributory negligence under the circumstances, but infers that if the jury should find that he was not thus adequately warned, he would not have been guilty of negligence.

There would have been much more justification for submitting such an instruction to a jury in a case like *Nabrotsky* v. *Salt Lake & Utah R. Co.*, 103 Utah 274, 135 P. 2d 115; or in the case of *Nuttall* v. *Denver & R. G. W. R. Co.*, 98 Utah 383, 99 P. 2d 15; or in the recent case of *Frank* v. *McCarthy*, 112 Utah 422, 188 P. 2d 737, where there was no mechanical signal at the crossing. The facts in the case at bar were stronger against the deceased Toomer and would convict him of contributory negligence as a matter

of law to a greater degree than would be true in either of the three cases just cited, and under the circumstances there is and was no justification for the court to submit to the jury the question as to whether or not Toomer as an ordinary prudent careful person should have been aware of the danger when the evidence was so overwhelming as to signals having been given and as to his lack of caution.

The court by Instruction No. 13 disregarded the law that has been set forth by this court in many of its cases, as well as by other courts, to the effect that "what constitutes ordinary care under such circumstances, or, as it is sometimes termed, 'the measure of duty,' is prescribed by law, and therefore is not left to the whim or caprice of either court of jury" (*Butler* v. *Payne,* 59 Utah 383, 203 P. 869). By such an instruction the court left it to the jury to decide according to its own whim what conduct should or should not constitute negligence, regardless of statute and regardless of what the law might otherwise be. The statute applicable in this case set an absolute standard of conduct. Because others may have violated the law the court cannot say that Toomer would be relieved of the resulting consequences if he violated it. The statute said he must stop and not proceed until he can do so safely, and where the evidence conclusively shows he did not stop and that he did not even proceed cautiously, it is prejudicial and reversible error for the court to so allow the jury to speculate on whether a reasonable person would have so violated the law and on such basis excuse Toomer for doing so. If such an instruction would ever be proper, it would have to be based upon some evidence showing operation of

the signal in question in such a manner that it could not be relied upon. There would have to be some evidence that people in the vicinity, including the deceased, knew of the unreliability of the signal, and there would have to be some evidence showing that Toomer had at least stopped and then proceeded cautiously over the crossing. In absence of any such evidence, the only conclusion that could properly be reached from the record in this case is that the statute set an absolute standard by which all men must be guided and controlled, and if they fall short of the standard thus set, they must know that they would suffer a criminal penalty and any other attendant consequences.

In Instruction No. 12 the court allowed the jury to find the defendant negligent if an ordinary prudent engineer would not have driven an engine onto the crossing at a speed as great as 30 miles an hour even though he had in all respects complied with the law. Here again the court disregarded standards of care which have been set by this and other courts with respect to the operation of such trains. Courts have repeatedly said that engineers or others in the operation of trains, even if they see vehicles approaching, do not need to slow down or stop the trains but are entitled to assume that approaching vehicles will comply with the law and stop and give way to the approaching train. The trial court under such circumstances, with an open crossing, would have instructed the jury, not that the engineer would be entitled to so assume, but that the jury could by their own whim or caprice decide whether a reasonable engineer would or would not stop. The law has been definitely set to the contrary.

In the case of *Lang* v. *Chicago & N. W. Ry. Co.*, (Wis.) 40 N. W. 2d 548, where there were box cars placed near the street at the crossing, the Supreme Court of Wisconsin stated that the railroad employes had a right to assume that persons driving a truck over the intersection would obey the statutory command and stop not less than 20 or more than 40 feet from the crossing.

In the case of *New York Cent. Ry. Co.* v. *Powell,* (Ind.) 47 N. E. 2d 615, the court said:

> "* * * It must have been the legislative conclusion that, of course, all travelers would take notice of the warning afforded by mechanical signals."

In the giving of Instructions Nos. 10, 12, 13 and 23, the court disregarded standards of care which have been set in railroad cases for years past and allowed the jury to speculate and set up, according to their own whim or caprice, what they would think a standard of care should be in this particular case, in spite of the fact and in face of the fact that there was a direct statute applicable to the facts of the case which set an absolute standard of care and provided a criminal penalty for violation. In doing so the court committed prejudicial and reversible error and the judgment of the trial court should be reversed.

POINT IV

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT THERE WAS A PRESUMPTION THAT TOOMER WAS IN THE EXERCISE OF ORDINARY CARE IMMEDIATELY PRIOR TO THE TIME OF THE COLLISION.

(Statement of Error No. 14.)

There is no presumption of due care on the part of a deceased when the only evidence in the case shows con-

clusively that the deceased was not in the exercise of due care. Such a presumption is available in the absence of evidence showing what may have been done by the deceased or what care may have been exercised by him. It is a presumption indulged in in the absence of evidence. But where there is evidence in a case as to the actions of the deceased or the amount of care exercised by him, then there is no presumption operative and it is error on the part of the court to instruct the jury that there is such a presumption when the evidence shows to the contrary.

This rule has been recently and effectively stated by this court in the case of *King* v. *Denver & Rio Grande Western R. Co.*, ... Utah ....., 211 P. 2d 833. In that case a brakeman riding a car on a flying switch was killed, and on appeal it was contended it would be presumed that the deceased was engaged in the performance of his duties and in the exercise of due care.

In the performance of his duties and exercising due care, the deceased would have been obligated to manipulate the brake upon the moving car. He was not in view of witnesses all the time, but at no time was he seen to be operating or attempting to operate the brake, and with respect to this presumption this court said:

> "The presumption that Thomas was engaged in the performance of his duties and in the exercise of due care for his own safety at the time of his death has not come into being because the evidence that Thomas at every point where observed, was making no attempt to apply the brake until within fifty feet of the end of the bin. At that time it was too late to stop the cars in the remaining distance

even if the brake were in perfect working order. * * *"

In the case of *Whiffin* v. *Union Pac. R. Co. et al.*, (Idaho) 89 P. 2d 540, in connection with the question of this presumption, the Idaho court, quoting an earlier case with approval, stated:

> "The respondent relies largely upon an indulgence of the presumption that the jury was at liberty to infer ordinary care and diligence on the part of the decedent from all of the circumstances of the case—his character and habits and the natural instincts of self-preservation—to hold the verdict. This can only be done in the absence of direct proof of the facts. The circumstances of the case alone are sufficient to rebut the presumption invoked. * * *"

POINT V

UNDER THE EVIDENCE IN THIS CASE THE SPEED OF THE STREAMLINER TRAIN WAS NOT A PROXIMATE CAUSE OF THE ACCIDENT AND THE COURT ERRED IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 4. (Statement of Error No. 15.)

There is no evidence in the case that the deceased ever saw the Streamliner train in question. It is clear that he could not at any time have observed it so as to appraise its speed. If he heard the signals but nevertheless assumed that he would have time to get across, he would be guilty thereby of contributory negligence without question.

In the case of *Vance* v. *Union Pac. R. Co.*, (Kan.) 298 P. 765, the trial court granted a nonsuit, or rather, sustained a demurrer to plaintiff's evidence. The train in question was operated at 20 miles an hour, whereas a city ordinance provided a speed limit for trains of 10 miles an hour. The Supreme Court of Kansas in affirming the trial court stated:

> "We think the court was warranted in sustaining the demurrer to plaintiff's evidence. The only negligence shown, and apparently the only one upon which plaintiff relies or has any ground to rely upon, is that the train was running at a speed in excess of that prescribed in the city ordinance. It is a well-established rule of law that the violation of a city ordinance regulating the rate of speed of trains within a city imposes no liability on the railroad company for an injury to others unless the violation was the efficient or proximate cause of the injury. * * *
>
> * * * * *
>
> "In regard to the excessive speed of the train, it appears that, when the engineer discovered that the driver was recklessly driving upon the track, he used all appliances and care to avert the collision, and it further appears that, even if the railroad train had been running at a ten-mile rate, the speed permitted by the city ordinance, the collision would have occurred due to the situation at the time, and the negligent approach to the crossing by the driver. * * *"

It cannot be said that if the train had been going only 30 miles an hour when Toomer drove in front of it he would not have been killed. Such a fatality is just as probable and as much a matter of common experience when a train

may be traveling 40, 50 or 60 miles an hour. The speed of the train was only a condition present, and the proximate cause was Toomer's driving in front of the train at the time and place.

This court recognized such a rule in *Horsley* v. *Robinson et al.*, 112 Utah 227, 186 P. 2d 592. In that case it was charged that defendant's bus was traveling too fast. This court said:

> "The mere happening of the accident of course does not prove that the defendants were negligent. Nor does the fact that the rate of speed at which they traveled brought them at the scene of the accident at the time the Reinhardt car went out of control and into the course of travel of the bus, because that is something that they could not anticipate and guard against. * * *"

Had it been the occupant of the Reinhardt car involved in the action, the court would thus have concluded that the speed of the bus was not the proximate cause of the collision. However, suit was by a passenger on the bus, and this court held:

> "* * * Of course, if this bus had been traveling at the rate of 5 miles per hour the collision with the Reinhardt car would not have injured the plaintiff because at that rate the bus being driven against a small car moving in the same direction would not create sufficient jar to injure the passengers. * * *"

The situation was different in the case at bar and a speed of 30 miles per hour within the city ordinance limit

would have made no difference as far as Toomer's injuries and death were concerned.

In *O'Malley* v. *Eagan et al.*, (Wyo.) 2 P. 2d 1063, cited by this court in *Horsley* v. *Robinson*, it was stated:

> "Speed, considered by itself, cannot, accordingly, be said to have necessarily contributed to the accident in question. That is clear when we bear in mind that if the defendant had traveled at a lawful rate of speed, but had started a few minutes earlier, he would have been at the place of accident just the same. The speed, therefore, considered by itself, may have been merely a condition of the accident, and remote in the chain of causation, from which no liability arose. * * *"

See also *Whalen* v. *Dunbar et al.*, (R. I.) 115 A. 718, wherein the Supreme Court of Rhode Island stated:

> "* * * If it should be conceded that the defendant's automobile at the time the emergency was created was proceeding at a rate of speed in excess of the statutory limit, there was no testimony of probative value showing or tending to show that the accident would not have happened if the defendant's automobile had been proceeding at the rate of 25 miles per hour, or even at a much less rate of speed, or that the speed of the defendant's automobile in any way entered into the cause of the collision.
>
> "As the speed of the defendant's automobile in no wise contributed to the accident, the rate of speed is immaterial, and liability cannot be predicated upon the speed of said automobile. (Cases cited.)"

In *Lynch* v. *Pennsylvania R. Co. et al.*, (Ohio) 194 N. E. 31, the deceased approached the crossing at 25 to 35 miles

per hour. There was an automatic crossing bell maintained at the crossing by the railroad company, and it was ringing and the locomotive whistle was sounded. There was a watchman on the far side of the crossing and he gave no signal to either stop or proceed. It was contended that the inaction of the watchman amounted to an invitation to proceed. A city ordinance limited the speed of trains to 10 miles per hour, and the train was exceeding that speed. Deceased did not attempt to slow down until 25 feet from the crossing, and then, seeing the train, skidded on the oiled street and collided with the engine. The trial court directed a verdict for the defendant and the Ohio Appellate Court affirmed the trial court stating:

> "Now it is claimed that the railroad company was negligent in operating the locomotive at a speed greater than 10 miles an hour, as provided in the ordinances of the city. This excess of speed, which was stated to be about 20 miles per hour, could not have been the proximate cause of the death of the decedent."

In the case of *Whiffin* v. *Union Pac. R. Co. et al.,* (Idaho) 89 P. 2d 540, wherein the plaintiff had pleaded the facts rather fully, the trial court sustained a general demurrer and the Supreme Court of Idaho affirmed the trial court. The deceased had driven over a double track in the City of Caldwell in the face of an automatic wigwag and lights. She had stopped for a passing freight train going one direction and started immediately as the freight passed and was struck by a passenger train going in the other direction on the next track. She assumed the operation of the flashing lights was caused by the departing freight, and

it was alleged that a flagman or gates should have been provided. It was also charged that the passenger train was passing at an excessive speed, greatly in excess of the 25 miles an hour provided by the City of Caldwell. The Idaho Supreme Court wrote an exhaustive opinion citing cases not only from the Idaho courts but from other states. The court gave an interesting discussion of the question of contributory negligence emphasizing the duty to observe caution and to look and listen in such a way as to make looking and listening effective.

On the question of the speed of the train in excess of the ordinance limit the Idaho Supreme Court said:

> "The speed of the train, though in excess and therefore in violation of the ordinance, is not shown to have been as such, a proximate cause of the accident, because it is alleged deceased did not know of the approach of the passenger train, hence perforce she did not rely on its approach at a legal speed permitting her to cross in front of it, and the rule in Fleenor v. Short Line R. Co., supra, does not assist the complaint. Nor are facts alleged which show that if the train had traveled at a legal rate, the accident would not have happened at all, or deceased been merely injured and not killed. No allegation states the distance of the city limits east of the crossing, how fast the passenger train was going, the exact relative position of the west end of the caboose on the freight train and front of passenger engine and consequent increasingly clear angle of vision to deceased before and as she started onto the north, middle or south track, and thus any attempt to determine how the speed as such contributed to the accident by considering the application of any analysis of the above essentials absent

from the complaint, or that a less speed would not have killed deceased, leads to mere speculation and conjecture. (Cases cited.)

"Deceased's negligence as contributing to the accident must be considered in the light of the circumstances as they existed, not as they might have been, so likewise must the speed of the passenger train, so far as the present complaint is concerned. Henderson v. St. Louis-San Francisco Ry. Co., 314 Mo. 414, 284 S. W. 788, 793."

The plaintiff on appeal argued:

"'If the train had not been running at an unlawful rate of speed, her life would have been spared.'"

But the Idaho Supreme Court answered:

"This is mere assertion, not argument or explanation. Death resulted because deceased most unfortunately drove her car in front of this train, which had a right to be on the track, and could have traveled no other place, which being at that point, at that time, could not have helped but strike deceased, and when she had herself proceeded to the place of danger. * * *"

See also *Holtkamp* v. *Chicago, B. & Q. R. Co.*, (Mo.) 234 S. W. 1054.

The trial court erred in refusing to give defendant's requested Instruction No. 4.

POINT VI

THE TRIAL COURT ERRED IN REFUSING TO GIVE DEFENDANT'S INSTRUCTION NO. 5 AS REQUESTED BECAUSE THE CROSSING WAS NOT SHOWN TO BE UNUSUALLY HAZARDOUS. (Statement of Error No. 16.)

We have already referred to the fact that the pleadings and evidence are wanting in showing hazards at this cross-

ing which would warrant additional protection or additional warnings. The case which is cited most and has been cited by nearly all jurisdictions over the country with respect to hazardous crossing is the case of *Grand Trunk Railway Company* v. *Ives,* 144 U. S. 408, 36 L. Ed. 485, 12 Sup. Ct. 679. In that case the Supreme Court said:

> "* * * It seems, however, that before a jury will be warranted in saying, in the absence of any statutory direction to that effect, that a railroad company should keep a flagman or gates at a crossing, it must be first shown that such crossing is more than ordinarily hazardous: as, for instance, that it is in a thickly populated portion of a town or city; or, that the view of the track is obstructed either by the company itself or by other objects proper in themselves; or, that the crossing is a much travelled one and the noise of approaching trains is rendered indistinct and the ordinary signals difficult to be heard by reason of bustle and confusion incident to railway or other business; or, by reason of some such like cause: and that a jury would not be warranted in saying that a railroad company should maintain those extra precautions at ordinary crossings in the country. * * *"

In the case at bar the crossing was located in the edge of the Town of Cokeville, a town of no more than 500 population. There were no cuts or curves in either the approaching track or the highway. There were no close buildings, no manufacturing establishments or excess traffic that might create noise. There was no evidence of any switching whatsoever that might cause confusing situations as far as the passing tracks were concerned, nor even any evidence of any unusual amount of switching on the house track, which

was some distance to the east, and there was no evidence as to the movement of trains over the crossing. In spite of all of this there was nevertheless the additional protection of a wigwag and bell at the crossing.

In the case of *Erwin* v. *Southern Pacific Co.*, (Ore.) 95 P. 2d 62, the Supreme Court of Oregon stated:

> "There is no common law duty to provide a greater warning to negligent or unlawful drivers than to careful ones."

In the case of *New York Cent. Ry. Co.* v. *Powell,* (Ind.) 47 N. E. 2d 615, there were some obstructions to view approaching a crossing, and the crossing was in a residential section of a town of about 600 people. In reversing the trial court's judgment on the ground that Powell was guilty of contributory negligence as a matter of law, and with respect to the crossing, the Indiana Supreme Court said:

> "* * * There was no evidence of unusual noises calculated to interfere with hearing signals and warnings. There was the usual cross-arm railroad warning, which was visible for a reasonable distance to one approaching the railroad, and the railroad company had provided, in addition to the signals required by statute, an automatic electric bell to warn travelers of the approach of trains. * * * We are constrained to hold that, under such circumstances, due care did not require the railroad company to provide warning or signaling devices in addition to the statutory signals and the crossing bell referred to. * * *"

In *Bledsoe* v. *Missouri, K. & T. R. Co.,* (Kan.) 90 P. 2d 9, it was argued that the crossing involved was an

unusually dangerous one. It was on a federal and state highway carrying especially heavy traffic. Large oil storage tanks near the track obstructed the view.

The trial court submitted the case to a jury, which returned a verdict for plaintiff. The Kansas Supreme Court reversed the trial court and directed a judgment for defendant, and on the question of a dangerous crossing the court said:

> "Plaintiffs further contend that whether a railroad crossing is unusually dangerous is a question of fact for the jury, * * * This is true only when there is substantial competent evidence that the crossing is unusually dangerous. Unless such evidence is produced the question is one of law for the court. The authorities on this point do not go so far as to authorize allegations to be made respecting any railroad crossing to the effect that it is unusually dangerous, and because of such allegations to say that the question is one for the jury. Examining the evidence in this case we are unable to find anything that would justify a classification of the crossing in question as being unusually dangerous. The fact that it is on a paved federal and state highway and bears the principal vehicular traffic from one direction to or from a city is common, to a greater or less degree, with respect to all such highways near all the cities of the state, and as previously noted, the amount of traffic on the highway had nothing to do with the casualty since there was no other traffic nearby on the highway at the time. The fact that there were lights near by does not distinguish it from other highways leading into and near cities. The fact that the roadbed was two or three feet above the level of the valley does not render it unusually dangerous. * * *"

See also *Johnson* v. *Union Pac. R. Co.*, (Kan.) 143 P. 2d 630.

POINT VII

THE TRIAL COURT ERRED IN REFUSING TO GIVE INSTRUCTIONS AS REQUESTED BY DEFENDANT WHICH WERE APPLICABLE TO THE FACTS OF THE CASE AT BAR.

(Statement of Errors Nos. 17, 18, 19, 20 and 21.)

Appellant has gone to some length in arguing concerning instructions as actually given by the court which were not applicable to the case, and we now want to refer the court to the fact that instructions were requested by defendant and refused by the court which were applicable to the facts that had been developed in the case and were in line with the standards of care which had been set by the courts—not only of this state—but of most of the states throughout the country.

Defendant's requested Instruction No. 15 would have informed the jury that it was the responsibility of the deceased Toomer to see and observe and listen to the wigwag signal and to heed its warning and stop.

Instruction No. 21 would have told the jury that the obstruction to view which may have been created by the standing freight train did not lessen the caution required of Toomer, but when considered with the mechanical wigwag, imposed a higher degree of care and caution on him.

Instruction No. 23 as requested would have told the jury that if by paying heed to the wigwag, and at least slow-

ing his truck down if not stopping, Toomer could have seen the approaching train in time to save himself, then he would have been negligent.

Instruction No. 25 again directed attention to the automatic wigwag and bell and told the jury that it was Toomer's responsibility to slow down or stop in response thereto.

If the court had given any of such requested instructions, the jury would then have been informed more properly and appropriately than it was as to the duty and measure of care set by all of the cases, and which Toomer as a reasonable man should have been held to comply with regardless of what a jury may conclude otherwise.

Instruction No. 16 as requested referred to physical facts, and by measurements on Exhibit No. 1, it can be shown that if Toomer had paid any attention whatsoever to the crossing signal and slowed his truck down even though he did not stop it, and if he had proceeded cautiously over the tracks as he approached the main line track, with his truck at a slow rate of speed, he would have been able to see the approaching Streamliner train in time to have stopped the truck and would have avoided a collision on the main line therewith. While the view afforded past the freight may have been short, still with the wigwag operating, a greater responsibility rested on Toomer, and while we cannot admit that the court was justified in submitting the matter to a jury at all, in submitting it to the jury as he did, he submitted improper standards of care with which

to let the jury speculate and did not submit instructions requested which were proper under the circumstances.

CONCLUSION

POINT VIII

THE TRIAL COURT ERRED IN REFUSING TO GRANT DEFENDANT'S MOTION FOR A NEW TRIAL. (Statement of Error No. 22.)

In connection with safety devices or mechanical signals which have been installed at crossings and which at a particular time fail to work, it has been held by numerous courts that a railroad company will not be permitted to encourage persons to relax their vigil concerning the dangers that lurk at railroad crossings by assuring them through the erection of such safety devices that the danger has been removed or minimized and at the same time hold them to the same degree of care as would be required if those devices had not been provided. See *Toschi* v. *Christian,* (Cal.) 149 P. 2d 848; *Will* v. *Southern Pacific Co.,* (Cal.) 116 P. 2d 44. Thus it has been held that a person may rely *not wholly* but to some extent on the silent bell or wigwag at a crossing. *Drummond* v. *Union Pacific Railroad Co.,* 111 Utah 289, 177 P. 2d 903. If this be true and if this be considered a proper rule binding a railroad company to greater responsibility merely because the signal or safety device has been installed but fails to work at a particular time, then the opposite should also be true and travelers should be held bound to obey a properly operating signal, and if a traveler

attempts to pass over a crossing in the face of a swinging wigwag, light and bell he should be held to do so at his peril and should be held guilty of negligence as a matter of law under such circumstances, regardless of whether there is any statute on the subject or not. Then when there is a statute providing a criminal penalty, as is true in the case at bar, the matter should not even be open to argument.

We are having all too many cases over the country in general and here in Utah in particular where people are being killed or seriously injured because they attempt to pass over crossings in spite of warnings of crossing signals actually in operation at the time. The most tragic occurrence recently in the State of Utah was the one wherein six children were killed at a crossing in Kaysville, Utah, where an adult driving the car in which they were riding drove in front of a fast passenger train in the face of flasher lights then in operation.

According to the 63rd Annual Report of the Interstate Commerce Commission (1949) p. 115, we are told that during the calendar year 1948 there occurred in the United States 3,543 accident in which automobiles collided with trains at grade crossings. These accidents caused the death of 1,612 persons and injuries to 4,255 others. In 50 of such accidents trains were derailed causing the death of 21 and injuries to 95 persons, 84 of those killed or injured in such derailments were rail passengers, or employes, or persons carried on trains under contract. Because of this alarming experience, which has not improved from year to year, the prevention of grade crossing accidents has become a major

problem not only for the railroads, but also for those in charge of traffic on the highways, and should also be of major concern to the courts—particularly the courts of last resort in any State.

According to the 1948 statistical report of the Oregon Public Utilities Commission, during the 10-year period ended December 31, 1948 nearly one-third (30.8%) of the grade crossing accidents in the State of Oregon occurred at crossings protected by train actuated signals, wigwags or flashing lights, or by crossing watchmen. With respect to accidents at such signalized crossings during the 10-year period the Oregon Public Utilities Commission found that "Disregard of the signal, attempting to beat the train across, and inability to stop because of excess speed, are the causes given for most of the accidents at these locations." An experience similar to that of the State of Oregon could no doubt be shown for many other States and we doubt that Utah would show a better record. Even the job of crossing watchman has become a hazardous occupation. Many have been struck down by motorists whose lives they were trying to save. Such a watchman, if employed by an interstate railroad, is subject to the Federal Employers' Liability Act and railroads have been required to pay damages resulting from accidents in which such watchmen have been killed or injured by motorists whom they were trying to protect. See *Eubanks* v. *Thompson, Receiver,* 334 U. S. 854, 68 S. Ct. 1497, 92 L. Ed. 1776, reversing *Missouri Pac. R. Co.* v. *Eubanks,* 207 S. W. 2d 610, 208 S. W. 2d 161.

These considerations make it increasingly important that the degree of care required of motorists in approaching

grade crossings shall be defined as definitely as possible, publicized sufficiently so that it may be understood by all, and then enforced so far as practicable.

Every experienced lawyer when he moves for a nonsuit or directed verdict senses the instinctive resistance of trial judges to take any trial case from the jury. We understand and appreciate some of their reasons. But even conscientious judges, by undue restraint lest they invade the jury's domain, may surrender functions which belong to the courts. The practical effect in such instances is to let juries, to a considerable extent at least, write their own law for the particular case.

By instructing the jury as he did in Instructions 10, 12, 13 and 23, the trial court herein very definitely let the jury write their own law and set their own standards of care for this case.

If instructions as given by the court herein were permitted to stand and to be given in other cases, then each jury would be free to evolve its own law of negligence for the particular case. Believing himself to be a reasonably prudent person the notions of each juror would become the only rules of law he could be expected to apply. He could decide that any human conduct whatsoever, though entirely lawful otherwise, constituted negligence for the purposes of the particular case. Conversely, he could decide that most any sort of conduct, though dangerous to others, violated no legal duty to them. He could by being thus unlimited in his decisions as to what a reasonable man might in his opinion do, overrule decisions of this court with respect to

standards required of all men as have been set and reaffirmed in cases like *Wilkinson* v. *Oregon Short Line R. Co.*, 35 Utah 110, 99 P. 466; *Butler* v. *Payne*, 59 Utah 383, 203 P. 869; *Shortino* v. *Salt Lake & Utah R. R.*, 52 Utah 476, 174 P. 860; *Nuttall* v. *D. & R. G. W. R. Co.*, 98 Utah 383, 99 P. 2d 15; *Nabrotzky* v. *Salt Lake & Utah R. Co.*, 103 Utah 274, 135 P. 2d 115; and *Drummond* v. *Union Pacific Railroad Company*, 111 Utah 289, 177 P. 2d 903.

With reference to railroad cases particularly, exact standards of care considered to be a minimum, regardless of what a jury might decide, have been set by this and other courts, and with the horrible experience of increasing accidents these standards should not be relaxed; particularly where a standard is set by legislative mandate it should be strictly adhered to. Any other policy would do nothing but encourage travelers on a highway to relax their care and caution and accidents would increase still more.

One of our Third District Court judges who is now aspiring to become a member of this court was recently quoted in an editorial in the Salt Lake Telegram (March 31, 1950) as saying there was too much "hocus-pocus" and "voodooism" in the law and that many a layman has become confused and bewildered because of "legalistic profundities." Be this criticism right or wrong, the courts should adhere to and make more pronounced, if possible, the standards to which a highway traveler should be bound so that a layman would know what his responsibility is.

If a court could submit questions to a jury to let the jury speculate on the question as to whether a reasonable

man driving a vehicle would enter on a crossing in face of a lighted, moving and sounding signal, with nothing more than that being shown, and in face of a statute prohibiting it and in spite of the uncontradicted evidence, as shown in the instant case, that the driver of the vehicle did not even slow down, and if such should be adopted as a proper rule, WHAT THEN COULD LAYMEN EXPECT? What could attorneys advise as to any standard of care required of all men, upon which standard reasonable minds should not differ? Under such circumstances we would have to advise laymen, officials, railroad employes and operatives, and all alike, and we would have to say to them: "Just what you are really expected to do we cannot say, but that will be determined by some future jury after you have had an accident, which jury will then be allowed to decide on their own as to whether or not they think you acted as a reasonable man."

As early as the *Wilkinson* case, supra, if not earlier, this court stated that certain standards must be met regardless of what a jury might find and without passing the matter to a jury where the facts are admitted, or not in dispute. In that case this court said that the law as generally adopted and applied by courts in this country was:

> "When one approaches a point upon a highway where a railroad track is crossed upon the same level it is his plain duty to proceed with caution, and if he attempts to cross the track, either on foot or in vehicle of any description, he must exercise in so doing what the law regards as ordinary care under the circumstances. He must assume that there is danger, and act with ordinary prudence and circum-

spection on that assumption. The requirements of the law, moreover, proceed beyond the featureless generality that one must do his duty in this respect, or must exercise ordinary care under the circumstances. *The law defines precisely what the term 'ordinary care under the circumstances' shall mean in these cases. In the progress of the law in this behalf the question of care at railway crossings, as affecting the traveler, is no longer, as a rule, a question for the jury. The quantum of care is exactly prescribed as a matter of law. In attempting to cross the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track.*" (Italics ours.)

These standards have long been adhered to but litigants and zealous attorneys have tried to force their relaxation to enable them to play upon the minds of sympathetic jurors, and protections afforded by the railroad companies have many times been stated to be only a minimum and courts have let the jury decide if more were needed. It has not been difficult to figure out some new and extraordinary obligation which, if performed by the railroad, might have insured a particular driver against his own carelessness. And experience reminds us that the maximum precaution which an ingenious litigant can suggest today may eventually become the minimum which some future jury may impose.

We ask the court to look at this case from the standpoint of its ultimate effect upon the railroads and the public generally so that by the pronouncement of this court the public may know whether or not they must pay any attention to warning signal devices erected at crossings, and so

that railroads may likewise know whether it is worthwhile in any event to erect such signalling devices in an effort to give further protection to the public.

The question as to whether or not adequate warning of the approach of the train herein had been given under the facts in this case should have been determined as a matter of law by the court and not submitted to the jury. The question of whether it was negligence for the engineer to enter the crossing at thirty miles per hour with all the warnings given, as shown by the record, on the basis of whether such warnings were adequate, should have been decided as a matter of law by the court and not submitted to the jury. With the evidence uncontradicted that the wig-wag, light and bell were all in operation at the time and that Toomer without exercising any caution at all and in violation of statutory law applicable thereto approached and passed over the crossing at 25 to 30 miles per hour, without having at any time stopped or slowed down, the court should have determined that he was guilty of negligence as a matter of law and should have directed a verdict for the defendant. Having failed to do so, this court should reverse the trial court and direct such verdict for the defendant.

By holding Toomer guilty of negligence as a matter of law and reversing the trial court on the basis that such trial court should have granted the directed verdict, this court will not be creating new law (in spite of the fact that the majority of law concerning negligence in tort cases was originally court-made law rather than law established

by any legislature). By so reversing the trial court and directing a verdict in favor of the defendant this court will only be affirming a standard heretofore set by the courts in the first instance and finally adopted as an absolute standard by legislative fiat.

The judgment of the trial court should be reversed and judgment should be entered for the defendant.

Respectfully submitted,

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